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## Quarterly Digest

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CONSTITUTIONAL, CIVIL, CRIMINAL & REVENUE LAWS  
(Covering important judgments of Supreme Court and Allahabad High Court)

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## **FROM THE CHAIRMAN'S DESK**

Parliament has recently passed Constitution (One Hundred and Twenty First Amendment) providing for constitution of National Judicial Appointments Commission to recommend the names of eligible persons for being appointed as Chief Justice of India, Supreme Court Judges, Chief Justices and Judges of High Courts by amending Articles 124, 127, 128, 217, 222, 224, 224A, 231 and by adding Articles 124A, 124B and 124C. Pursuant to Article 124C 'The National Judicial Appointments Commission Act 2014' has also been passed. However, by virtue of its Section 1(2), the Act is to come into force on a date to be appointed by the Central Government by notification in the official gazette, which has not yet been notified. The President of India gave assent to the Act on 31.12.2014. The Commission consists of Chief Justice of India, two senior most Judges of Supreme Court, Union Law Minister and two eminent persons (one of whom shall be from amongst the persons belonging to the Scheduled Caste, Scheduled Tribe, Other Backward Class, minorities or women) to be nominated by the

Committee consisting of Prime Minister, Chief Justice of India and leader of opposition. However, the Commission has not yet been constituted in as much as the two eminent persons have not yet been selected. Chief Justice of India in a statement given on 09.01.2015, as reported in Hindustan Times, Lucknow Edition dated 10.01.2015 stated that National Judicial Appointments Commission was yet to takeoff, hence, there was no bar for the Supreme Court Collegium to select new Judges (High Court and Supreme Court Judges)/ recommend names for elevation. In some quarters apprehension about the Act is being expressed that it will affect independence of Judiciary. The Act has been challenged in the Supreme Court also. M. Khare and K. Pandey two students of Allahabad University have written an article 'Status of the Independence of judiciary under evolving judicial appointment system in India which has been published in Journal Section of AIR January, 2015, page 1.

The Union Government intended to amend the new Land Acquisition Act (The Right to Fair Compensation and Transparency in Land Acquisition,

Rehabilitation and Resettlement Act). However, as the Bill could not be passed in Rajya Sabha due to disruptions, hence, on the next working day after the adjournment of Parliament in December, 2014 *sine die* ordinance no. 9 of 2014 was promulgated. The salient features of the ordinance are that the words “private company” wherever they occur in the Act have been replaced by the words “private entity” and rigour of the Act has been softened in case of acquisition of land for such projects which are vital to national security or defence of India, rural infrastructure, houses for poor, industrial corridors and infrastructure projects under public private partnership where ownership of land remains with the Government.

Some more ordinances like Coal Mines (Special Provisions) second Ordinance, Citizenship Amendment Ordinance, Motor Vehicles Amendment Ordinance were also promulgated just after conclusion of the winter session of the Parliament in December, 2014.

The Coal Mines Ordinance for allocation of coal mines has been promulgated due to the judgment of the Supreme Court dated 25.08.2014 and subsequent

order dated 24.09.2014 cancelling the allocation of coal blocks and issuing directions to the Central Government with regard thereto. The first ordinance was promulgated on 21.10.2014; however, it could not be made Act of Parliament as the subsequent bill could not be passed in Rajya Sabha.

Through the Citizenship (Amendment) Ordinance, 2015, Sections 7A to 7D of the Act relating to overseas citizenship (dual citizenship, with limited rights) have been substituted.

Through amendment in Motor Vehicles Act e-carts and e-rickshaws have been included under the Act which have been defined to mean battery powered vehicle of power not exceeding 4000 watts having three wheels for carrying goods or passengers. The amendment was the need of the hour as in case of accident or violation of Motor Vehicles Act by e-rickshaws it was not legally possible to proceed against their owners and drivers for compensation or punishment as they were not covered by Motor Vehicles Act.

Promulgation of ordinances just after conclusion

of parliament session has been criticized in several quarters. Even President of India has cautioned against this trend. Simultaneously, he has also censored the conduct of the opposition disrupting the proceedings of the House (*Rajya Sabha*) (as reported in various newspapers dated 20.01.2015; 'A noisy minority cannot be allowed to gag a patient majority.') However, the President has also said that joint session (as is being contemplated by the ruling party) is no solution to end *Rajya Sabha* logjam.

In the Times of India, Lucknow Edition dated 13.1.2015, it has been mentioned that according to the latest data available on the Supreme Court website there are 3.20 crore cases pending in the Courts in India which is more than the population of countries like Saudi Arabia, Malaysia and so on. It has also been mentioned that according to the data number of vacancies of judges are 19.4 per cent in Supreme Court, 29.2 per cent in the High Courts and 22 percent in various Districts and Subordinate Courts. Allahabad High Court has got 10.4 lakhs pending cases with civil cases having a larger share of about 7 lakhs. It is

interesting to note that in the District Courts in U.P. the position is reverse. Pending Civil Cases are 14.2 lakhs and criminal cases are 43 lakhs.

Transfer of matrimonial case of whatever nature it might be to a place of the choice of wife even if she was plaintiff/ applicant in the case was till now considered to be absolute right of the wife. However, in a recent case the Supreme Court through a Bench headed by the Chief Justice of India has sought to reverse the trend holding that the court had been very lenient to the pleas of wives to put husbands to discomfiture and too liberal in acceding to the demands of the wives, as reported in Times of India, Lucknow Edition dated 09.01.2015.

On 22.01.2015, Supreme Court delivered the judgment regarding the status of Board of Cricket Control of India (BCCI) and the role of its chief (in-exile) N. Srinivasan as reported in the newspapers of the next day. (The case had been initiated by the Cricket Association of Bihar). BCCI is the world's richest cricket body. The Court held that BCCI is a public body discharging public functions because it is the official

selector of the national cricket team hence it would be amenable to the writ jurisdiction of the High Court even though it is not a State within the meaning of Article 12 of the Constitution. BCCI is conducting for last several years Indian Premier League (IPL) matches. One of the participating teams is Chennai Super Kings owned by India Cements Ltd. a company run by N. Srinivasan. The Supreme Court held that dual role points to a 'conflict of interest' hence same person cannot hold both the positions and a contrary rule of the Board permitting such dual role was struck down which according to the Supreme Court allowed its officials to simultaneously wear two hats. Earlier, Meiyappan son-in-law of N. Srinivasan had been found guilty of betting by the Court appointed Justice Mukul Mudgal panel. The Supreme Court also setup three member committee headed by former Chief Justice R.M. Lodha to decide the quantum of punishment to be awarded to Maiyappan and others including both teams i.e. Chennai Super Kings and Rajasthan Royals.

On 28.01.2015, Allahabad High Court commuted death sentence to life imprisonment of Surendra Kohli,

notorious Nithari Killer who had been convicted of cannibalism and murder of a 14 year old girl Rimpa Haldar. He is accused of eighteen other such cases of murder of minor girls and women and eleven criminal cases are still pending against him. The death sentence awarded to him by the Trial Court was confirmed by the High Court as well as Supreme Court. The main reason given for commuting the death sentence is delay in disposal of mercy petition. Mercy petition moved by Kohli in May 2011 was rejected by the President of India in July, 2014. Thereafter, twice the Supreme court stayed the hanging as recall plea had been filed before it and thereafter a PIL was filed in the Allahabad High Court in which first hanging was stayed and on 28.01.2015 the PIL was allowed. (Times of India 29.01.2015)

As reported in the newspapers of 29.01.2015, the Central Government on 28.01.2015 had indicated that it would not file appeal against an order passed by Bombay High Court granting relief to the tune of Rs. 3200/- crore in a tax case to telecom company Vodafone. (Earlier, after an order passed against the

same company by the Supreme Court granting tax relief of several thousand crores, the then Central Government had amended the tax law retrospectively. The present Government is against retrospective imposition of tax liability). The government has decided not to appeal against Judgment of the Bombay High Court as in its opinion it would be fruitless litigation and would discourage investors, as reported in Times of India, dated 29.01.2015.

It has also been reported that the Attorney General had advised the Government not to file appeals etc. against orders of Courts and Tribunals granting tax relief to assesses. However, Communication Minister, Ravi Shanker Prasad, who was earlier Law Minister also, expressed the opinion that such decision should be taken after studying other cases.

To impose tax liability retrospectively by amending the law after judgment of the highest court in favour of assessee is one thing and not to challenge an order in favour of assessee before higher court even under existing law is quite another. Both are divergent extremes.

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**This Journal is meant only for reference and guidance. For authentic and detailed information, readers are advised to consult referred Journal(s).**

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154. **Rathnavathi v. Kavita Ganashamdas, 2014(32) LCD 2260**
155. **Samunder Singh v. State of Rajasthan, 2014 (6) SLR 616 (Raj.)**
156. **Sau Shaila Balasaheb Kadam v. Balasaheb Hindu Rao Kadam, 2014(32) LCD 2486**
157. **Shahid Ali vs. Union of India and another, 2014 (4) ESC 1903 (Del)(DB)**

158. **Shashikant Vishwakarlama v. State of U.P. & others, 2015(5) ALJ 521**
159. **Shiv Murat and another v. State of U.P. and others 2014 (5) AWC 5295**
160. **Shiv Swarup Gupta v. Rajeev Kumar Rastogi, 2014(3) ARC 544**
161. **Smt. Dhanwanti and another v. State of U.P. and others 2014 (5) AWC 5439**
162. **Smt. Indrawati v. Shri Pati Mishra, 2014(32) LCD 2582 (All.)(L.B.)**
163. **Smt. Munni Devi v. Smt. Sona Devi, 2014(32) LCD 2623**
164. **Smt. Ram Dulari v. Yogya Mohan,(2014 (3) ARC 815**
165. **Smt. Rekha Mishra & another vs. Shiv Prasad Srivastava & others, 2014 (6) ALJ 797**
166. **Sri Ram Builders v. State of M.P. and others, 2014(6) AWC 5987**
167. **Srihari (Dead) Through L.Rs. v. Syed Maqdoom Shah, 2014 (32) LCD 2509**
168. **State of U.P. and another v. Girish Chandra Upadhyay and another 2014 (5) AWC 5163**
169. **State of U.P. v. 1<sup>st</sup> Addl. District Judge, 2014(32) LCD 2114 (All.)**
170. **Suleman and others v. State of U.P. and another, 2014 (87) ACC 23 Allahabad High Court**
171. **Tahira Begum (Smt.) and others v. Xth A.D.J. and others, 2014(3) ARC 657**
172. **Union of India vs. Narendra Kumar Gupta, 2014 ACJ 2242. (All. H.C.- Lucknow-Bench)**
173. **United India Insurance Co. Ltd. Vs. D. Vasanth, 2014 ACJ 2186. (Madras H.C.)**
174. **Vidhya Viswanathan v. Kartik Balakrishnan, 2014(6) AWC 5909**
175. **Vidyawati Asthana & 2 Others v. The Additional District Judge & 3 Others, (2014 (3) ARC 820**
176. **Yogesh Agarwal v. Rajendra Goyal and others, 2014(6) AWC 5892**

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## **PART – 1 (SUPREME COURT)**

### **Arbitration and Conciliation Act**

**S.2**—Seat of arbitration—Determines Court which has supervisory control over arbitration—Agreement fixing juridical seat as London—Further providing that arbitration would be governed by English law—It is no longer open to parties to contend that provisions of Part-I of the Arbitration Act, 1996 would be applicable to arbitration agreement—And that Indian Court will have exclusive jurisdiction. [**Reliance Industries Limited vs. Union of India, AIR 2014 SC 3218**]

**Ss.2(b), 5**—Arbitration agreement—Interpretation—Policy of least intervention to be adopted by court—Court has to make arbitration clause workable

Whilst interpreting the arbitration agreement and/or the arbitration clause, the court must be conscious of the overarching policy of least intervention by courts or judicial authorities in matters covered by the Act. The Courts have to adopt a pragmatic approach and not a pedantic or technical approach while interpreting or construing an arbitration agreement or arbitration clause. Therefore, when faced with a seemingly unworkable arbitration clause, it would be the duty of the Court to make the same workable within the permissible limits of the law, without stretching it beyond the boundaries of recognition. In other words, a common sense approach has to be adopted to give effect to the intention of the parties to arbitrate. In such a case, the court ought to adopt the attitude of a reasonable business person, having business common sense as well as being equipped with the knowledge that may be peculiar to the business venture. The arbitration clause cannot be construed with a purely legalistic mindset, as if one is construing a provision in a statute. [**Enercon (India) Ltd. & Ors. vs. Enercon GMBH, AIR 2014 SC 3152**]

**Ss.2(b), 5, 10, 11**—Arbitration clause—Ensuring its workability—Court can add obvious words—Arbitration clause providing for 3 arbitrators—Words that arbitrator appointed by each party shall appoint third arbitrator, missing—Missing line that “the two Arbitrators appointed by the parties shall appoint the third Arbitrator” can be read into the arbitration clause. [**Enercon (India) Ltd. & Ors. vs. Enercon GMBH, AIR 2014 SC 3152**]

**Ss.2(b),16—Arbitration agreement—Validity—Arbitration clause contained in main agreement—Plea that main agreement was not concluded contract—Does not make arbitration clause null and void or incapable of being performed**

The court can decline to make a reference to arbitration in case it finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The plea that the matter cannot be referred to arbitration as the substantive agreement containing the arbitration clause/agreement is not a concluded contract does not fall within the parameters of an agreement being “null and void, inoperative or incapable of being performed” in terms of Sections 14, 15, 16, 17, 18, 19, 19A and 20 of the Indian Contract Act, 1872. These provisions set out the impediments, infirmities or eventualities that would render a particular provision of a contract or the whole contract void or voidable. [**Enercon (India) Ltd. & Ors. vs. Enercon GMBH, AIR 2014 SC 3152**]

**Ss. 2, 16—Applicability of Part-I—Substantive contract containing arbitration clause stipulated to be governed by Indian law—Arbitration clause however made to be governed by English law—Cannot be said that of English laws would only govern conduct of arbitration—And as substantive contract is governed by laws in India seat of arbitration is India and Arbitration Act (1996) would apply. [**Reliance Industries Limited vs. Union of India, AIR 2014 SC 3218**]**

**Ss.2(2), 34, 16—Arbitration—Applicability of 1996 Act—Product Sharing Contract (PSC) containing arbitration clause—Contract providing that law of contract would be Indian law—As regards arbitration its venue was to be England and Governing law stipulated to be English law—Clause providing for arbitration further stipulating that parties should approach Permanent Court of Arbitration at Hague for appointment of arbitrator—Clauses of contract clearly indicate that law governing substantive contract and law governing arbitration are different and applicability of 1996 Act was excluded—Court in India therefore has no jurisdiction to entertain petition u/s. 34. [**Reliance Industries Limited vs. Union of India, AIR 2014 SC 3218**]**

**Ss. 2, 34—Applicability of Part I—Product sharing contract—Indian law made applicable to substantive contract—Seat of arbitration however stipulated as London with English law as curial law—Dispute regarding taxes, royalties, rentals etc.—Plea that issues involved relate to violation of public policy of India and therefore, applicability of Part I of 1996 Act cannot be excluded even if seat of arbitration is London—Not tenable as claim made is for reimbursement of royalties/cess already paid—No claim made by claimants that they are exempted from Indian law—Moreso**

applicability of Part-I of the Arbitration Act, 1996 is not dependant on nature of challenge to award. [**Reliance Industries Limited vs. Union of India, AIR 2014 SC 3218**]

**S.11—Reference to arbitration—Objection of voidity of main contract—Contract between petitioner and respondent for providing services—Stipulation in contract that in case petitioner engages in corrupt practices respondent has to be indemnified for loss suffered and respondent can terminate contract—Dispute between parties about non-payment for service provided—Reference sought by petitioner objected by respondent by invoking non-liability clause in view of criminal cases filed against its officials for corruption—Held, registration of criminal cases cannot be ground to defer reference—Permitting arbitration to proceed along with criminal case would prejudice none as in case officials get convicted rendering contract void award passed can be resisted during execution. [**Swiss Timing Limited vs. Organising Committee, Commonwealth Games, 2010, Delhi, AIR 2014 SC 3723**]**

**S.11(6)—Appointment of arbitrator—Court would be free to depart from agreed terms of appointment—When dispute has remained pending before arbitrators for long time—Power of Court has to be exercised to effectuate remedy and facilitate the mechanism.**

In the present case Clauses 64(3)(a)(ii) and (iii) of the General Conditions of Contract do not prescribe any specific qualification of the arbitrators that are to be appointed under the agreement except that they should be railway officers. Even if the arbitration agreement was to specifically provide for any particular qualification(s) of an arbitrator the same would not denude the power of the Court acting under Section 11(6), in an appropriate case to depart therefrom. In *UOI vs. Singh Builders Syndicate*, (2009) 4 SCC 523: AIR 2009 SC (Supp) 1795, pendency of arbitration proceedings for over a decade was found by this Court to be a mockery of the process. In the present case, admittedly the award in respect of disputes and differences arising out of the contract No. CAO/CON/722 is yet to be passed. Though the appellant-Railway has in its pleadings made a feeble attempt to contend that the process of arbitration arising out of the said Contract has been finalized, no material, whatsoever, has been laid before the Court in support thereof. The arbitration proceedings to resolve the disputes and differences arising out of Contract No. CAO/CON/738 has not even commenced. A period of nearly two decades has elapsed since the contractor had raised his claims for alleged wrongful termination of the two contracts. The situation is distressing and to say the least disturbing. The power of the Court under the Act has to be exercised to effectuate the remedy provided there-under and to facilitate the mechanism

contemplated therein. In a situation where the procedure and process under the Act has been rendered futile, the power of the Court to depart from the agreed terms of appointment of arbitrators must be acknowledged in the light of the several decisions noticed by us. We are, therefore, of the view that no infirmity muchless any illegality or failure of justice can be said to be occasioned by the order passed by the High Court so as to warrant any interference. [**North Eastern Railway vs. Tripple Engineering Works, AIR 2014 SC 3506**]

**Ss. 11, 16, 45**—Reference to arbitration—Objection that main contract is void and so reference should not be made—Not to be accepted unless it is possible for court to come to conclusion that contract is void without any evidence—Court has to be conscious that issue whether main contract is void/voidable can be referred to arbitration. [**N Radhakrishnan vs. Maestro Engineers & Others, (2010) 1 SCC 72; AIR 2010 SC (Supp) 307; 2010 AIR SCW 331, Not good law**]

**S.16—Arbitration clause—Is an agreement independent of main contract—Rationale behind concept of separability**

The concept of separability of the arbitration clause/agreement from the underlying contract is a necessity to ensure that the intention of the parties to resolve the disputes by arbitration does not evaporate into thin air with every challenge to the legality, validity, finality or breach of the underlying contract. The Indian Arbitration Act, 1996, as noticed above, under Section 16 accepts the concept that the main contract and the arbitration agreement form two independent contracts. Commercial rights and obligations are contained in the underlying, substantive, or the main contract. It is followed by a second contract, which expresses the agreement and the intention of the parties to resolve the disputes relating to the underlying contract through arbitration. A remedy is elected by parties outside the normal civil court remedy. It is true that support of the National Courts would be required to ensure the success of arbitration, but this would not detract from the legitimacy or independence of the collateral arbitration agreement, even if it is contained in a contract, which is claimed to be void or voidable or unconcluded by one of the parties. [**Enercon (India) Ltd. & Ors. Vs. Enercon GMBH, AIR 2014 SC 3152**]

**S.20**—Seat of arbitration—Determination—Phrase “arbitration in London”—Can be understood to include venue as well as seat—But words “venue of arbitration shall be in London” could not be understood as “seat of arbitration shall be London”, in the absence of any other factor connecting arbitration to London. [**Enercon (India) Ltd. & Ors. Vs. Enercon GMBH, AIR 2014 SC 3152**]

**S.20—Arbitration—** Jurisdictional Court—Intellectual property licensing agreement between Indian and German companies—Arbitration clause in agreement providing that arbitration would be as per Indian Law—Main contract was to be performed in India and was governed by Indian law—Enforcement of award will be in India—Indian Courts would therefore have jurisdiction over arbitration proceedings—Fact that England was made venue of arbitration would not confer concurrent jurisdiction on English Court—Indian company held entitled to issue anti-suit injunction restraining German company to initiate action in English Courts. [**Enercon (India) Ltd. & Ors. Vs. Enercon GMBH, AIR 2014 SC 3152**]

**Ss. 20, 2—**Seat of arbitration—Parties to arbitration making provisions of 1996 Act applicable to proceedings—Part 1 of Act made applicable—Arbitration agreement providing that law governing the contract, the law governing the arbitration agreement and the law of arbitration/curial law are Indian laws—Fact that arbitration is to be held in London does not make London seat of arbitration—London is merely venue of arbitration and not its seat—Law governing arbitration will therefore be Indian law and not English law—Courts in India would have exclusive jurisdiction. [**Enercon (India) Ltd. & Ors. vs. Enercon GMBH, AIR 2014 SC 3152**]

### **Civil Procedure Code**

**S.11, Order. 35, Rule 5—Res judicata—**Appellant owner of building over cantonment land—Petition against resumption dismissed as title cannot be decided in writ petition—Cantonment Board however held not entitled to receive rent in inter-pleader suit filed by tenant of suit property—In appeal by appellant against rejection by Board of permission for construction of building—Parties relegated to civil court for deciding question of title—Plea that title of appellant having been decided in inter-pleader suit, order relegating parties to civil court for deciding question of title was barred by resjudicata—Not tenable as neither in proceedings against resumption nor in inter-pleader suit question of title was gone into. [**Purshottam Das Tandon vs. Military Estate Officer, AIR 2014 SC 3555**]

**S. 115, Order II, Rule 2 and Order VII, Rule 6A of Civil Procedure Code, 1908—**Counter claim was dismissed being barred by principles of Order II, Rule 2 CPC.

Keeping in mind the conceptual meaning given to the counter-claim and the definitive character assigned to it, there can be no shadow of doubt that when the counter-claim filed by the defendants is adjudicated and dismissed, finality is attached to it as far as the controversy in respect of the claim put

forth by the defendants is concerned. Nothing in that regard survives as far as the said defendants are concerned. If the definition of a decree is appropriately understood it conveys that there has to be a formal expression of an adjudication as far as that Court is concerned. The determination should conclusively put to rest the rights of the parties in that sphere. When an opinion is expressed holding that the counter-claim is barred by principles of Order 2, Rule 2 C.P.C., it indubitably adjudicates the controversy as regards the substantive right of the defendants who had lodged the counter-claim. It cannot be regarded as an ancillary or incidental finding recorded in the suit. In this context, we may fruitfully refer to a three-Judge Bench decision in *M/s. Ram Chand Spg. & Wvg. Mills v. M/s. Bijli Cotton Mills (P) Ltd., Hathras and Others*, AIR 1967 SC 1344, wherein their Lordships was dealing with what constituted a final order to be a decree. The thrust of the controversy therein was that whether an order passed by the executing court setting aside an auction sale as a nullity is an appealable order or not. The Court referred to the decisions in *Jethanand and Sons v. State of Uttar Pradesh*, AIR 1961 SC 794, and *Abdul Rahman v. D.K. Kassim and Sons*, AIR 1933 PC 58, and proceeded to state as follows:-

“In deciding the question whether the order is a final order determining the rights of parties and, therefore, falling within the definition of a decree in Section 2(2), it would often become necessary to view it from the point of view of both the parties in the present case - the judgment-debtor and the auction-purchaser. So far as the judgment-debtor is concerned the order obviously does not finally decide his rights since a fresh sale is ordered. The position however, of the auction-purchaser is different. When an auction-purchaser is declared to be the highest bidder and the auction is declared to have been concluded certain rights accrue to him and he becomes entitled to conveyance of the property through the court on his paying the balance unless the sale is not confirmed by the court. Where an application is made to set aside the auction sale as a nullity, if the court sets it aside either by an order on such an application or suo motu the only question arising in such a case as between him and the judgment-debtor is whether the auction was a nullity by reason of any violation of Order 21, Rule 84 or other similar mandatory provisions. If the court sets aside the auction sale there is an end of the matter and no further question remains to be decided so far as he and the judgment-debtor are concerned. Even though a resale in such a case is ordered such an order cannot be said to be an interlocutory order as the entire matter is finally disposed of. It is thus manifest that the order setting aside the auction sale amounts to a final decision relating to the

rights of the parties in dispute in that particular civil proceeding, such a proceeding being one in which the rights and liabilities of the parties arising from the auction sale are in dispute and wherein they are finally determined by the court passing the order setting it aside. The parties in such a case are only the judgment-debtor and the auction-purchaser, the only issue between them for determination being whether the auction sale is liable to be set aside. There is an end of that matter when the court passes the order and that order is final as it finally, determines the rights and liabilities of the parties, viz., the judgment-debtor and the auction-purchaser in regard to that sale, as after that order nothing remains to be determined as between them.”

After so stating, the Court ruled that the order in question was a final order determining the rights of the parties and, therefore, fell within the definition of a decree under Section 2(2) read with Section 47 and was an appealable order.

We have referred to the aforesaid decisions to highlight that there may be situations where an order can get the status of a decree. A Court may draw up a formal decree or may not, but if by virtue of the order of the Court, the rights have finally been adjudicated, irrefutably it would assume the status of a decree. As is evincible, in the case at hand, the counter-claim which is in the nature of a cross-suit has been dismissed. Nothing else survives for the defendants who had filed the counter-claim. Therefore, we have no hesitation in holding that the order passed by the learned trial Judge has the status of a decree and the challenge to the same has to be made before the appropriate forum where appeal could lay by paying the requisite fee. It could not have been unsettled by the High Court in exercise of the power under Article 227 of the Constitution of India.

Consequently, the appeal is allowed and the order passed by the High Court is set aside. However, as we are annulling the order on the ground that revision was not maintainable, liberty is granted to the respondents to prefer an appeal before the appropriate forum as required under law. We may hasten to add that we have not expressed any opinion on the merits of the case. There shall be no order as to costs. [**Rajni Rani & Anr. vs. Khairati Lal & Ors., 2014(3) ARC 726 (SC)**]

**S. 115—Revision—Rent control matters—High Court cannot exercise the power as an appellate power to re-appreciate or reassess evidence**

Group of eleven appeals and three special leave petitions were referred to the 5-Judge Bench to resolve the conflict into the two 3-Judge Bench

decisions one, *Rukmini* and the other, *Ram Dass*. *Ram Dass* has followed *Moti Ram*. At the time of hearing of Civil Appeal No.6177 of 2004, Hindustan Petroleum Corporation Ltd. v. Dilbahar Singh, the 2-Judge Bench, while dealing with the meaning, ambit and scope of the words “legality and propriety” under Section 15(6) of the Haryana Urban (Control of Rent & Eviction) Act, 1973 (for short, ‘the Haryana Rent Control Act’), was confronted with the question whether the High Court (as revisional authority) under Section 15(6) could interfere with the findings of fact of the first appellate Court/first appellate authority. The appellant relied upon the decision of this Court in *Rukmini1* in support of its contention that the revisional Court is not entitled to re-appreciate evidence. On the other hand, the respondent pressed into service the decision of this Court in *Ram Dass2* wherein it has been held that the expression “legality and propriety” enables the revisional Court to reappraise the evidence while considering the findings of the first appellate Court. The 2-Judge Bench felt that there was conflict in the two decisions and for its resolution referred the matter to the larger Bench.

The two Judge Bench also felt that the matter needs to be considered by a larger bench since this question arises in a large number of cases as similar provisions conferring power of revision exists in various rent control and other legislations, e.g. Section 397 of the Code of Criminal Procedure.

Rent Control Acts entitles the High Court to interfere with the findings of fact recorded by the First Appellate Court/First Appellate Authority because on reappraisal of the evidence, its view is different from the Court/Authority below. The consideration or examination of the evidence by the High Court in revisional jurisdiction under these Acts is confined to find out that finding of facts recorded by the Court/Authority below is according to law and does not suffer from any error of law. A finding of fact recorded by Court/Authority below, if perverse or has been arrived at without consideration of the material evidence or such finding is based on no evidence or misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice, is open to correction because it is not treated as a finding according to law. In that event, the High Court in exercise of its revisional jurisdiction under the above Rent Control Acts shall be entitled to set aside the impugned order as being not legal or proper. The High Court is entitled to satisfy itself the correctness or legality or propriety of any decision or order impugned before it as indicated above. However, to satisfy itself to the regularity, correctness, legality or propriety of the impugned decision or the order, the High Court shall not exercise its power as an appellate power to reappraise or re-assess the evidence for coming to a different finding on facts.

Revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a court of first appeal. Where the High Court is required to be satisfied that the decision is according to law, it may examine whether the order impugned before it suffers from procedural illegality or irregularity.

Conceptually, revisional jurisdiction is a part of appellate jurisdiction but it is not vice-versa. Both, appellate jurisdiction and revisional jurisdiction are creatures of statutes. No party to the proceeding has an inherent right of appeal or revision. An appeal is continuation of suit or original proceeding, as the case may be. The power of the appellate court is co-extensive with that of the trial court. Ordinarily, appellate jurisdiction involves re-hearing on facts and law but such jurisdiction may be limited by the statute itself that provides for appellate jurisdiction. On the other hand, revisional jurisdiction, though, is a part of appellate jurisdiction but ordinarily it cannot be equated with that of a fullfledged appeal. In other words, revision is not continuation of suit or of original proceeding. When the aid of revisional court is invoked on the revisional side, it can interfere within the permissible parameters provided in the statute. It goes without saying that if a revision is provided against an order passed by the tribunal/appellate authority, the decision of the revisional court is the operative decision in law. As regards the extent of appellate or revisional jurisdiction, much would, however, depend on the language employed by the statute conferring appellate jurisdiction and revisional jurisdiction. The ordinary meaning of the word 'legality' is lawfulness. It refers to strict adherence to law, prescription, or doctrine; the quality of being legal. The term 'propriety' means fitness; appropriateness, aptitude; suitability; appropriateness to the circumstances or condition conformity with requirement; rules or principle, rightness, correctness, justness, accuracy. The terms 'correctness' and 'propriety' ordinarily convey the same meaning, that is, something which is legal and proper. In its ordinary meaning and substance, 'correctness' is compounded of 'legality' and 'propriety' and that which is legal and proper is 'correct'. The expression "regularity" with reference to an order ordinarily relates to the procedure being followed in accord with the principles of natural justice and fair play.

The 5 Judge Bench held that the view of the Supreme Court in Rukmini is approved and the decision of Supreme Court in Ram Dass should be read as explained by this 5 Judge Bench in this judgment. [**Hindustan Petroleum Corporation Ltd. vs. Dilbahar Singh, AIR 2014 SC 3708**]

**Ss. 149, 151, 96, 100 and Or. 7 R. 11 (c), Or. 41 & 42- Maintainability of appeal- Deficiency in court fee in respect of plaint- Can be made good**

**during the appellate proceedings.**

The scheme of the above provisions is clear. It casts duty on the Court to determine as to whether or not court-fee paid on the plaint is deficient and if the court-fee is found to be deficient, then give an opportunity to the plaintiff to make up such deficiency within the time that may be fixed by the Court. The important thread that runs through sub-sections (2) and (3) of Section 6 of 1870 Act is that for payment of court-fee, time must be granted by the court and if despite the order of the court, deficient court-fee is not paid, then consequence as provided therein must follow.

The High Court was clearly in error in invoking the above provision without appreciating the fact that there was no order by the trial court directing the plaintiffs to make good the deficit court-fee within a particular time.

The High Court was also in error in holding that deficiency in court-fee in respect of plaint cannot be made good during the appellate stage. In this regard, the High Court, overlooked well known legal position that appeal is continuation of suit and the power of the appellate court is co-extensive with that of the trial court. It failed to bear in mind that what could be done by the trial court in the proceeding of the suit, can always be done by the appellate court in the interest of justice.

The order of the first appellate court being eminently just and proper, in our view, there was no justification for the High Court to invoke its power under Article 227 of the Constitution of India and interfere with an order which effectively advanced the cause of justice.

For all these reasons, the impugned order is unsustainable in the eye of law and deserves to set-aside and is set-aside. [**Tajender Singh Ghambhir vs. Gurpreet Singh, (2014) 10 SCC 702**]

**Section 151 to 153 of Civil Procedure Code, 1908– High Court by exercising powers under Section 152 C.P.C. allowed applications and directed said preliminary decree be amended.**

**Order XX, Rule 18(2) of Civil Procedure Code,1908 – Provisions under – Decree in suit for partition of property or separate possession of a share therein.**

The last sentence of judgment and order passed by the Appellate Court – High Court of Andhra Pradesh in first appeal A.S. No. 734 of 1991 whereby suit for partition is decreed, is reproduced below –

“The suit is accordingly decreed and appeal is allowed with costs”.

By the impugned order dated 21.4.2005 exercising powers under Section 152 of the Code, the First Appellate Court has now directed as under:

“Accordingly, for the reasons stated above, these applications are allowed and the decree in A.S. No. 734 of 1991 dated 25.1.1996 is directed to be amended allotting and dividing half share in the suit schedule property to the petitioners 1 and 2, one-fourth share to respondents 1 to 6 herein and one-fourth share to respondents 7 to 15 herein. There shall be no order as to costs”.

Had the appellate court, not decreed the suit with discussion of evidence after rejecting the plea of the defendant No.12 as to his claim of ownership, and had the defendants 1 to 11 not pleaded for separation of their shares with admission of share of the plaintiff as decreed by the Appellate Court, it could have been said that the High Court erred in declaring shares of the plaintiff or the defendants by resorting to Section 152 of the Code. But in the present case since there is a clear finding of shares of the parties in the judgment and order dated 25.1.1996, as such by clarifying the decree by the impugned order, in our opinion the High Court has committed no mistake of law. In this connection, we would like to re-produce sub-rule (2) of Rule 18 of Order XX of the Code, which reads as under:

“18. Decree in suit for partition of property or separate possession of a share therein --Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,--

xxx xxx xxx xxx

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties, interested in the property and giving such further directions as may be required”.

Above quoted sub-rule clearly indicates that in the preliminary decree not only the right of the plaintiff but rights and interests of others can also be declared.

It would be proper to refer the case of *Shub Karan Bubna alias Shub Karan v. Sita Saran Bubna and Others* (2009) 9 SCC 689 wherein it is explained that “partition” is a redistribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of land or other properties jointly held by them into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint

ownership is terminated and the respective shares vest in them in severalty.

This Court has earlier also reiterated in *U.P.S.R.T.C. v. Imtiaz Hussain (2006) 1 SCC 380* that the basis of provision of Section 152 of the Code is found on the maxim '*actus curiae neminem gravabit*' i.e. an act of Court shall prejudice no man. As such an unintentional mistake of the Court which may prejudice the cause of any party must be rectified. However, this does not mean that the Court is allowed to go into the merits of the case to alter or add to the terms of the original decree or to give a finding which does not exist in the body of the judgment sought to be corrected.

For the reasons as discussed above, we do not find force in these appeals which are liable to be dismissed. Accordingly, the appeals are dismissed. No order as to costs. [Srihari (dead) through Lr. Smt. Ch. Niveditha Reddy vs. Syed Maqdoom Shah and others. 2014(3) ARC 701 (SC)]

**O. II, R.2 – Applicability of – Two suits having different cause of action are not hit by Or. II, R. 2, CPC**

Admittedly, the first suit being O.S. No.445 of 1985 was filed by the plaintiff-appellant for the grant of permanent injunction restraining the defendant, his agents and servants from interfering with the possession and enjoyment of the suit property by the plaintiffs either by attempting to trespass into it or in any other manner whatsoever. Besides other facts, it was pleaded that in pursuance of the sale agreement the plaintiff took possession of the suit plot from the defendant and began construction of Kalyana Mahal. It was alleged by the plaintiff that the defendant with an ulterior malafide motive and intention of extracting more money was representing to the plaintiffs that he would execute the sale deed after getting the sale deed from the Housing Board and after completion of the construction of the building. With that ulterior motive, the defendant tried to forcibly take possession of the building constructed by the plaintiffs and threatened the plaintiffs worker to remove them from the building. The plaintiffs then gave complaint to the police and in response, the police immediately rushed to the suit property and warned the rowdies not to enter into the building. The plaintiffs, therefore, pleaded that the defendant was again arranging to gather unruly elements and to forcibly and unlawfully take possession of the suit property from the plaintiffs. With that apprehension, the suit was filed mainly on the cause of action which arose when the defendant attempted to forcibly occupy the suit property by driving away plaintiffs workers and that the defendant was arranging to forcibly and unlawfully take possession of the suit property. The defendant, in his written

statement, denied each and every allegation and stated that building was constructed by him and in fact the plaintiffs attempted to forcibly take possession of the building.

In the subsequent suit filed by the plaintiff being O.S. No.252 of 1986, a decree for specific performance of the agreement was claimed on the ground inter alia that the defendant in the earlier suit took a defence that the sale agreement was allegedly given up or dropped by the plaintiff. The cause of action, as pleaded by the plaintiff in the subsequent suit, arose when defendant-respondent disclosed the transfer made by Housing Board in his favour and finally when the defendant was exhibiting an intention of not performing his part of the sale agreement and in reply to the lawyers notice the defendant made a false allegation and denied to execute the sale deed as per the agreement.

A perusal of the pleadings in the two suits and the cause of action mentioned therein would show that the cause of action and reliefs sought for are quite distinct and are not same.

Indisputably, cause of action consists of a bundle of facts which will be necessary for the plaintiff to prove in order to get a relief from the Court. However, because the causes of action for the two suits are different and distinct and the evidences to support the relief in the two suits are also different then the provisions or Order 2, Rule 2 CPC will not apply. **(Inbasegaran and another v. S. Natarajan (D) through LRs., 2014 (7) Supreme 737)**

#### **Execution Proceedings - Order XXI Rules 97-103 and 104**

**The order passed by the execution court is not a 'decree' in absence of adjudication of rights, title and interest in the property under dispute – Matter was directed to be decided by the High Court under Article 227 of the Constitution of India – Civil Appeal Allowed.**

It is settled position of law that the court has the authority to adjudicate all the questions pertaining to right, title or interest in the property arising between the parties. It also includes the claim of a stranger who apprehends dispossession or has already been dispossessed from the immovable property. The self-contained Code, as has been emphasised by this Court, enjoins the executing court to adjudicate the lis and the purpose is to avoid multiplicity of proceedings. It is so because prior to 1976 amendment the grievance was required to be agitated by filing a suit but after the amendment the entire enquiry has to be conducted by the executing court. Order XXI, Rule 101 provides for the determination of necessary issues. Rule 103 clearly stipulates that when an application is adjudicated upon under Rule 98 or Rule 100 the said order shall have the same force as if it were a decree. Thus, it is a

deemed decree. If a Court declines to adjudicate on the ground that it does not have jurisdiction, the said order cannot earn the status of a decree. If an executing court only expresses its inability to adjudicate by stating that it lacks jurisdiction, then the status of the order has to be different. In the instant case the executing court has expressed an opinion that it has become functus officio and hence, it cannot initiate or launch any enquiry. The appellants had invoked the jurisdiction of the High Court under Article 227 of the Constitution assailing the order passed by the executing court on the foundation that it had failed to exercise the jurisdiction vested in it. The appellants had approached the High Court as per the dictum laid down by this Court in *Surya Dev Rai v. Ram Chander Rai and others*, (2003) 6 SCC 675.

Whether the executing court, in the obtaining circumstances, has correctly expressed the view that it has become functus officio or not and thereby it has jurisdiction or not, fundamentally pertains to rectification of a jurisdictional error. It is so as there has been no adjudication. If a subordinate court exercises its jurisdiction not vested in it by law or fails to exercise the jurisdiction so vested, the said order under Section 115 of the Code is revisable as has been held in *Joy Chand Lal Babu v. Kamalaksha Chaudhury and others*, AIR 1949 PC 239. The same principle has been reiterated in *Keshardeo Chamria v. Radha Kissan Chamria and others*, AIR 1953 SC 23 and *Chaube Jagdish Prasad and another v. Ganga Prasad Chaturvedi*, AIR 1959 SC 492. Needless to emphasise that the said principle is well-settled. After the amendment of Section 115, C.P.C. w.e.f. 1.7.2002, the said power is exercised under Article 227 of the Constitution as per the principle laid down in *Surya Dev Rai (supra)*. Had the executing court apart from expressing the view that it had become functus officio had adjudicated the issues on merits, the question would have been different, for in that event there would have been an adjudication.

In view of the forgoing analysis, we conclude and hold that the High Court has fallen into error by opining that the decision rendered by the executing court is a decree and, therefore, an appeal should have been filed, and resultantly allow the appeal and set aside the impugned order. The High Court shall decide the matter as necessary under Article 227 of the Constitution of India. As a long span of time has expired we would request the High Court to dispose of the matter within a period of three months. There shall be no order as to costs. [**Sameer Singh vs. Abdul Rab, 2014(32) LCD 2241 (SC)**]

**Order 39, Rules 1, 2**—Temporary injunction—When can be granted—Failure of petitioner to prove his prima facie title in pending suit—His actual physical possession on suit land also not proved because even as per his own case he had

accepted agreement for landed property on ‘as is where is basis’ which was not in occupation of even defendants/vendors—He is yet to secure decree of specific performance for land in question in order to develop it—Agreement of sale in his favour itself was cancelled by vendor—On other hand respondent was able to prima facie establish that agreement of sale had been executed in his favour and there was also evidence in support of his plea regarding his possession on land in question for last 30 years—Decree of temporary injunction cannot be passed in favour of petitioner. [**Ramesh Vajabhai Rabari vs. Pratiksha Real Estate Pvt. Ltd. & Ors., AIR 2014 SC 2962**]

**Order XL, Rule 1 – Powers of court Receiver as to bringing and defending suits an owner himself has.**

A Division Bench of the Calcutta High Court in *Kassim Mamooji v. K.B. Dutt and another*, AIR 1916 Cal. 51, has held that the present Code empowers the court to confer upon a Receiver all such powers as to bringing and defending suits as the owner himself has. It would suffice to quote the following:

“Originally a Receiver could not sue: this is shown by the decision of Phear, J., in *Wilkinson v. Gangadhar Sirkar*, 1871(6) Beng. LR 486. That decision was in 1871. In 1877, however, was passed in Civil Procedure Code of that year : and in it was contained the provision which now finds a place in Order XL, Rule 1 of the present Code (see Section 503 of the Code 1877). The present Code empowers the court to confer upon a Receiver all such powers as to bringing and defending suits as the owner himself has.”

In the aforesaid decision, it has been held that the words of Order XL, Rule 1 cannot give any narrower construction for holding that the Code does not empower the Receiver to bring a suit for recovery of possession of immovable property. [**Shree Ram Urban Infrastructure Ltd. (Formerly known as Shree Ram Mills Ltd.) v. Court Receiver, High Court of Bombay, 2014(6) AWC 5630(SC)**]

**Order 41, Rules 17, 19—Appeal—Non-appearance by appellant—Appeal could not have been heard on merits—Court could only dismiss it in default—No sufficient cause was shown for non-appearance by appellants—Thus even if order of High Court deciding said appeal on merits was treated as not proper and substituted it with order dismissing said appeal in default—There is no reason to recall order dismissing appeal in default**

The respondent had filed the Suit seeking partition of two properties claiming half share each in both these properties mentioned in Schedules A and B. The trial court had decreed the Suit in respect of Schedule B property but dismissed the same qua Schedule A property. Both the parties had gone in appeal. In so far as appeal of the respondent is concerned, the same has been allowed *ex parte* as nobody appeared on behalf of the appellants. This course of action was available to the High Court as sub-rule (2) of Order XLI Rule 17 categorically permits it. Though the appellants moved application for setting aside this order, the same was dismissed on the ground that no reasonable or sufficient cause for non-appearance was shown. Therefore, this part of the order of the High Court is without blemish and is not to be interfered with. Appeal their against is dismissed.

In so far as appeal of the appellants against grant of preliminary decree in respect of Schedule B is concerned, it could not have been heard on merits in the absence of the appellant. The Court could only dismiss it in default.

Having said so, the question that arises is that even if the appeal was to be dismissed in default, whether that order warranted to be recalled on application made by the appellants. As is clear from the reading of Rule 19 of Order XLI, the appellants were supposed to show sufficient cause for their non-appearance. The High Court has given categorical finding that no such cause is shown. The learned senior counsel for the appellants did not even address on this aspect or argued that the reason given by the appellant in the application filed before the High Court for non-appearance amounted to sufficient cause and the order of the High Court is erroneous on this aspect. As a result, even if we treat the order of the High Court deciding the appeal of the appellants on merits was not proper and proceed further by substituting it with the order dismissing the said appeal in default, we do not find any reason to recall the order dismissing the appeal in default. [Harbans Pershad Jaiswal vs. Urmila Devi Jaiswal, AIR 2014 SC 3032]

**Order 41, Rule 27—Additional evidence—Documents sought to be produced before appellate court are bank accounts—Not necessary to take said documents on record in interest of justice—Moreover earlier they were rejected to be taken on record by Trial Court and said rejection was affirmed by High Court—Thus taking recourse to sub-rule (1)(b) of O.41, R. 27 and allowing application for taking such additional evidence—Not proper**

In the instant case, the documents which are sought to be filed before the appellate court as additional evidence are bank accounts which really are

not clinching to put end to the controversy. It is extremely difficult to put the case under Order XLI Rule 27 (1)(b) to suggest that it is necessary to take the documents on record in the interest of justice and, additionally, when the said documents were rejected to be taken on record by the trial court and the said rejection had been affirmed by the High Court. The spectrum that can be covered under Order XLI Rule 27(1)(b) may be in a broader one but in certain cases judicial propriety would be an impediment and the present case is one where the judicial propriety comes on the way. Therefore, the appellate court has erred in taking recourse to the said clause and allowing the application for taking additional evidence and similarly the High Court has committed illegality opining that the order passed by the lower appellate court does not suffer from any infirmity. [**Surjit Singh vs. Gurwant Kaur, AIR 2014 SC 3679**)]

**Order XLIII, Rule 1—Provision does not prescribe by any particular format for applying for leave of Court. Grant thereof can be inferred from the facts of the case**

There is nothing in Order XLIII Rule 1 of the Code of Civil Procedure that leave to appeal has to be applied for in any particular format. In the circumstances, the High Court was not justified in dismissing the appeal on a technical ground and it ought to have considered the merits of the matter. Court hold the appeal preferred by the present appellant to be maintainable and proceed to consider the basic issues involved in the matter. [**Ghanshyam Sarda vs. M/s Shiv Shankar Trading Co. & Ors., 2014 (8) Supreme 4**]

## **Constitution of India**

**Art. 14—Allotment of plots for industrial Units at lower rates than market value—Allottee does not get vested rights—Appellant provisionally allotted two plots by mistake—Subsequent reduction to one as per extant policy—Not illegal**

If the initial allotment (2 plots) made in favour of the appellant was contrary to the relocation policy itself the appellant will have no right to retain both the plots. In fact the allotment being pursuant to a policy and at prices much lower than the market price no vested right to be allotted a plot can be recognized. At best a right of fair consideration alone can be attributed which does not appear to have been breached in the present case so as to have required correction in exercise of the jurisdiction vested in the High Court under Article 226 of the Constitution. [**Jai Bhagwan Goel Dal Mill vs. Delhi State Industrial and Infrastructure Development Corporation Ltd., AIR 2014 SC 3764**]

**Arts. 16 and 311(2) (b) -Industrial Disputes Act, Sec. 10 (1) -Haryana Civil Services (Punishment and Appeal) Rules, 1987, R. 7- Reference - Limitation- Award -Termination of Service- Dispensing with enquiry- If order dispensing enquiry was justified- Labour Court had not considered important legal aspects -Hence rejection of reference on ground of Limitation was not justified -Dispensing of enquiry was without reasons and termination was bad in law**

From the termination order, it is clear that the appellant continuously remained absent from his duties for more than five months. Despite the publication of the notice, the appellant neither joined his duty nor did he submit his reply. Therefore, the respondent straight away passed an order of termination without conducting an enquiry as required in law against the appellant to prove the alleged misconduct of unauthorised absence by placing reliance upon Article 311(2)(b) of the Constitution of India.

In view of the undisputed facts narrated as above, it is clear that no enquiry was conducted by the appellant against the workman to prove the alleged misconduct of unauthorised absence from his duties. The reason for dispensing with the enquiry is not at all forthcoming in the order of termination which refers to the aforesaid constitutional provision. With regard to conduct and discipline of its employees the respondent is bound to follow the Industrial Employment Standing Orders Act, 1946. The Labour Court has failed to take into account these important legal aspects of the case and has erroneously rejected the reference by answering the additional issue no.2 on the question of limitation which is totally irrelevant and not adjudicating the points of dispute on merits has rendered its award bad in law. This amounts to failure to exercise its statutory power coupled with duty.

Court are of the view that the Labour Court and the High Court have erred in not deciding the industrial dispute between the parties on the basis of admitted facts, firstly, the enquiry not being conducted for the alleged misconduct of unauthorised absence by the appellant from 02.04.1993 and secondly, the enquiry being dispensed with by invoking Article 311(b)(2) of the Constitution of India without any valid reason. Moreover, an order stating the impossibility of conducting the enquiry and dispensing with the same was not issued to the appellant. The reasoning assigned in the order of termination is bad in law. Therefore, the impugned judgment, order and award of the High Court and the Labour Court are required to be set aside as the same are contrary to the provisions of the Act, principles of natural justice and the law laid down by this Court in catena of cases. **(Raghubir Singh v. General Manager, Haryana Roadways, Hissar, 2014 (6) SLR 6 (SC)**

**Art. 16 – Compassionate appointment -Adequate compensation- Whether**

**it can become ground for refusal to compassionate appointment- Held “yes”, if an employer paints act that the financial arrangement made for family subsequent to the death of the employee is adequate**

The one B.P. Tripathi the father of the first respondent was working in the State Bank of India from 27.12.1969 and he died while in service on 19.1.1998 after completing more than 28 years of service. At that time he was working as Assistant Manager. The respondent No.1 who is his son applied for a job on compassionate basis and his application was turned down by the Bank which led to the writ petition. The writ petition was allowed by the learned Single Judge and the appeal of the Bank therefrom was dismissed. Hence this appeal by special leave.

The counsel appearing for the respondent, on the other hand, submitted that this was a hard case, and the deceased has left behind a large family. Apart from the widow, he had two sons and five daughters and three of them were unmarried. Considering this fact it was expected that the Bank should provide appointment to one of the members of the family when the main bread earner had passed away. Court relied upon the judgment of this Court in Govind Prakash Verma vs. Life Insurance Corporation of India & Ors, reported in 2005 (10) SCC 289 where a view has been taken that the compassionate appointment cannot be refused on the ground that another member of the family had received appropriate employment and the service benefits were adequate. We may humbly state that this view runs counter to the view which was taken earlier in the case of Umesh Kumar Nagpal which was not cited before the Court in Govind Prakash (supra). The subsequent two judgments which were referred above also take the same view as in Umesh Nagpal (supra). Mr. Vikas Singh has drawn our attention to the judgment in the case of State Bank of India & Anr. v. Somvir Singh reported on 2007 (4) SCC 778 where the 1998 scheme has been considered.

In all the matters of compassionate appointment it must be noticed that it is basically a way out for the family which is financially in difficulties on account of the death of the bread earner. It is not an avenue for a regular employment as such. This is in fact an exception to the provisions under Article 16 of the Constitution. That being so, if an employer points out that the financial arrangement made for the family subsequent to the death of the employee is adequate, the members of the family cannot insist that one of them ought to be provided a comparable appointment. This being the principle which has been adopted all throughout, it is difficult for us to accept the submission made on behalf of the respondent. **(State Bank of India & Ors. v. Surya Narain Tripathi; 2014 (6) SLR 210 (SC)**

**Art. 21, 14, 19, 32,145(1-B), 137,134- Review of Supreme Court Judgements by circulation or oral hearing as per Judges’ direction as**

**provided in Or. 40 R.3 (as amended in 1978) of Supreme Court Rules, 1966**

Oral submissions by a skilled advocate can effectively draw the attention of the court to the most relevant factor(s), mitigating factor(s), which might possibly be overlooked if Judges are only required to go through written arguments/pleadings- Further, the number of death review cases before Supreme Court are roughly 60 per annum and therefore, the Supreme Court should be able to manage the same by limited oral hearing of 30 minutes as prescribed in present judgment.

Such a procedure for review of death sentence cases is in compliance with the principle of “due process of law”: is just, fair and reasonable, which would not be so review by circulation is adopted instead of such oral hearing.

Furthermore, considering procedure laid down under Or. 6 R. 3 of the Supreme Court Rule, 2013, pending and future review petitions against death sentence confirmed by Supreme Court, shall be heard by Benches of there Judges after giving the counsel a maximum of 30 minutes to make oral submissions- This special procedure shall also apply where a review petition has been already dismissed but death sentence has not yet been executed. It would also apply to TADA cases. Where review petition has been dismissed, but death sentence not executed, petitioners can apply for reopening of review petition within one month from the date of this judgment. However, in those matters where a curative petition has been dismissed, it would not be proper to reopen such matters.

Death convict undergoing 13½ yrs of imprisonment, whether entitled to any relaxation in view of Art.20(1). Held, spending 13½ yrs in jail does not means that death convict has undergone a sentence of life. Nor can it be pleaded that his death sentence was converted to life imprisonment. A sentence of life imprisonment means entire life and not merely 14 yrs in jail. Penal Code, 1860. Ss.53,57–Criminal procedure Code, 1973, Ss. 415, 418 and 426 to 428.

Deflecting a little from the death penalty cases, we deem it necessary to make certain general comments on sentencing, as they are relevant to the context. Crime and punishment are two sides of the same coin. Punishment must fit the crime. The notion of ‘just deserts’ or a sentence proportionate to the offender’s culpability was the principle which, by passage of time, became applicable to criminal jurisprudence. It is not out of place to mention that in all of recorded history, there has never been time when crime and punishment have not been the subject of debate and difference of opinion. There are no statutory guidelines to regulate punishment. Therefore, in practice, there is much variance in the matter of sentencing. In many counties, there are laws prescribing sentencing guidelines, but there is no statutory sentencing policy in India. The IPC, Prescribes only the maximum punishments for offences and in

some cases minimum punishment is also prescribed. The Judges exercise wide discretion within the statutory limits and the scope for deciding the amount of punishment is left to the judiciary to reach decision after hearing the parties. However, what factors which should be considered while sentencing is not specified under law in any great detail. Immanuel Kant, the German philosopher, sounds pessimistic when he says, “judicial punishment can never serve merely as a means to further another good, whether for the offender himself or for the society, but must always be inflicted on him for the sole reason that he has committed a crime”. A sentence is a compound of many factors, including the nature of the offence as well as the circumstances extenuating or aggravating the offence. A large number of aggravating circumstances and mitigating circumstances has been pointed out of **Bachan Singh v. State of Punjab, SCC at pp. 749-50, para 202 & 206, (1980) 2 SCC 683: 1980 SCC (Cri) 580**, that a Judge should take into account when awarding the death sentence. Again, as pointed out about, apart from the fact that these lists are only illustrative, as clarified in **Bachan Singh, (1980) 2 SCC 683: 1980 SCC (Cri) 580**, itself, different judicially trained minds can apply different aggravating and mitigating circumstances to ultimately arrive at a conclusion, on considering all relevant factors that the death penalty may or may not be awarded in any given case. Experience based on judicial decisions touching upon this aspect amply demonstrate such a divergent approach being taken. Though, it is not be emphasized that when on the same set of facts, one judicial mind can come to the conclusion that the circumstances do not warrant he death penalty, whereas another may feel it to be a fit case fully justifying the death penalty, we feel that when a convict who has suffered the sentence of death and files a review petition, the necessity of oral hearing in such a review petition becomes an integral part of “reasonable procedure”. [**Mohd. Arif v. Supreme Court of India, (2014) 9 SCC 738**]

**Art. 32 – Nature – Article 32 is heart and soul of the constitution guaranteeing right to move Supreme Court for enforcement of fundamental rights**

Article 32 of the Constitution which has been described as the “heart and soul” of the Constitution guarantees the right to move the Supreme Court for the enforcement of all or any of the fundamental rights conferred by Part III of the Constitution. This Article is, therefore, itself a fundamental right and it is in this backdrop that court need to address the preliminary submission. [**Assam Sanmilita Mahasangha & Ors. vs. Union of India & Ors., 2014(8) Supreme 641**]

**Art.141—Precedents—**Judgments of Supreme Court are not to be read as

statutory instruments—Ratio of judgment has to be culled out, keeping in view facts and circumstances involved in a particular case. [**Oil and Natural Gas Corporation Ltd. vs. Official Liquidator of M/s. Ambica Mills Company Ltd., AIR 2014 SC 3011**]

**Binding precedence – Ratio of any decision must be understood in the background of the facts of that case**

It is well settled that the ratio of any decision must be understood in the background of the facts of that case. The following words of Lord Denning in the matter of applying precedence have been *locus classicus*.

“Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.”

**(Inbasegaran and another v. S. Natarajan (D) through LRs., 2014 (7) Supreme 737)**

**Art. 226(2)—Territorial jurisdiction—**Petition claiming disability compensation filed by appellant in his native place, i.e. State of Bihar—Appellant, Seaman suffered from serious heart muscle disease which forced him to stay in native place—Order cancelling his registration as seaman passed in Mumbai—Appellant made all his correspondence regarding his disability compensation from his native place—**Part or fraction of cause of action arose within jurisdiction of Patna High Court—Dismissal of writ petition by High Court for want of jurisdiction—Not proper.** [**Nawal Kishor Sharma vs. Union of India, AIR 2014 SC 3607**]

**Art. 311—Disciplinary inquiry—Dispensation—Order must be reasoned—Cannot be on ipse dixit of disciplinary authority—Order terminating from service member of police force without inquiry—Merely because he was involved in corruption, sting operation conducted by media—improper**

Non-ascribing of reason while passing an order dispensing with enquiry, which otherwise is a must, definitely invalidates such an action. In this context, reference to the authority in *Union of India and Anr. v. Tulsiram Patel*, (1985) 3 SCC 398 is apposite. In the said case the Constitution Bench, while

dealing with the exercise of power under Article 311(2)(b), has ruled thus:

“130. The condition precedent for the application of clause (b) is the satisfaction of the disciplinary authority that “it is not reasonably practicable to hold” the inquiry contemplated by clause (2) of Article 311. What is pertinent to note is that the words used are “not reasonably practicable” and not “impracticable”. According to the *Oxford English Dictionary* “practicable” means “Capable of being put into practice, carried out in action, effected, accomplished, or done; feasible”. *Webster’s Third New International Dictionary* defines the word “practicable” inter alia as meaning “possible to practice or perform : capable of being put into practice, done or accomplished: feasible”. Further, the words used are not “not practicable” but “not reasonably practicable”. *Webster’s Third New International Dictionary* defines the word “reasonably” as “in a reasonable manner: to a fairly sufficient extent”. Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonable man taking a reasonable view of the prevailing situation.”

“A disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the department's case against the government servant is weak and must fail.”

The decision to dispense with the departmental enquiry cannot, therefore, be rested solely on the ipse dixit of the concerned authority. When the satisfaction of the concerned authority is questioned in a court of law, it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the concerned officer.” [**Risal Singh vs. State of Haryana, AIR 2014 SC 2922**]

## **Consumer Protection Act**

**S.2(1)(g)**—Deficiency in services—Investment of amount by university with Unit Trust of India for betterment of its employees—Stipulation in ‘terms of offer’ that maturity amount will depend on NAV and that the same was guaranteed not to be below par value of Rs. 10 per unit—All investments are subject to markets risks and fluctuations and investor has to exercise due caution while investigating any amount in any Scheme—Just because maturity amount was below expectations of complainant/university it cannot drag service provider i.e. U.T.I. to Court for same. [**Punjab University vs. Unit Trust of India, AIR 2014 SC 3670**]

### **S.12 – Punitive damages awarded by National commission – Consideration of – No relief can be granted without pleading or averment.**

The main question raised in these appeals is whether in the absence of any prayer made in the complaint and without evidence of any loss suffered, the award of punitive damages was permissible.

Section 12 of the Act permits not only a complaint by a consumer to whom goods are sold or delivered but also any recognized consumer association or one or more consumers on behalf of and for the benefit of all consumers but still, a case has to be made out and the affected party heard on such issue. We are conscious that having regard to the laudable object of the social legislation to protect the interest of consumers, liberal and purposive interpretation has to be placed on the scheme of the Act avoiding hyper technical approach. At the same time, fair procedure is hall mark of every legal proceeding and an affected party is entitled to be put to notice of the claim with such affected party has to meet.

In present case neither there is any averment in the complaint about the suffering of punitive damages by the other consumers nor the appellant was aware that any such claim is to be met by it. Normally, punitive damages are awarded against a conscious wrong doing unrelated to the actual loss suffered. Such a claim has to be specially pleaded. The respondent complainant was satisfied with the order of the District Forum and did not approach the State Commission. He only approached the National Commission after the State Commission set aside the relief granted by the District Forum. The National Commission in exercise of revisional jurisdiction was only concerned about the correctness or otherwise of the order of the State Commission setting aside the relief given by the District Forum and to pass such order as the State Commission ought to have passed. However, the National Commission has gone much beyond its jurisdiction in awarding the relief which was neither

sought in the complaint nor before the State Commission. We are thus, of the view that to this extent the order of the National Commission cannot be sustained. We make it clear that we have not gone into the merits of the direction but the aspect that in absence of such a claim being before the National Commission and the appellant having no notice of such a claim, the said order is contrary to principles of fair procedure and nature justice. We also make it clear that this order will not stand in the way of any aggrieved party raising a claim before an appropriate forum in accordance with law. **General Motors (India) Private Limited vs. Ashok Ramnik Lal Tolat & Anr. 2014(4) CPR 797(SC)**

### **Contempt of Courts Act**

**S.13(b) (as substituted by Amedment Act 6 of 2006)—Contempt—Defence—Truth is valid defence in any contempt proceedings.**

A two Judge Bench of this Court in *Indirect Tax Practitioners' Association vs. R.K. Jain, (2010) 8 SCC 281: AIR 2011 SC 2234: 2011 AIR SCW 3252* had an occasion to consider Section 13 of the 1971 Act, as substituted by Act 6 of 2006. In para 39 (page 311 of the report), the Court said:

“.....The substituted Section 13 represents an important legislative recognition of one of the fundamentals of our value system i.e. truth. The amended section enables the court to permit justification by truth as a valid defence in any contempt proceeding if it is satisfied that such defence is in public interest and the request for invoking the defence is bona fide. In our view, if a speech or article, editorial, etc. contains something which appears to be contemptuous and this Court or the High Court is called upon to initiate proceedings under the Act and Articles 129 and 215 of the Constitution, the truth should ordinarily be allowed as a defence unless the Court finds that it is only a camouflage to escape the consequences of deliberate or malicious attempt to scandalise the court or is an interference with the administration of justice. Since, the petitioner has not even suggested that what has been mentioned in the editorial is incorrect or that the respondent has presented a distorted version of the facts, there is no warrant for discarding the respondent's assertion that whatever he has written is based on true facts and the sole object of writing the editorial was to enable the authorities concerned to take corrective/remedial measures.”

Thus, the two Judge Bench has held that the amended section enables the Court to permit justification by truth as a valid defence in any contempt

proceedings if it is satisfied that such defence is in public interest and the request for invoking the defence is bona fide. We approve the view of the two Judge Bench in R.K. Jain. **[Dr. Subramanian Swamy vs. Arun Shourie, AIR 2014 SC 3020]**

## **Contract Act**

**S.56—Frustration of contract—Sale of land—Permission from competent authority u/s. 118 of H.P. Tenancy and Land Reforms Act necessary, as pre-condition for sale—Permission granted only for some area of land and not for entire land—Contract would not be frustrated thereby—Earnest money and advance paid to vendor need not be forfeited—In facts of case, award of interest at rate of 6% per annum on amount decreed by Court from date of institution of suit is legal and valid.**

Where permission from competent authority u/s. 118 of H.P. Tenancy and Land Reforms Act was necessary as a pre-condition for sale of land and again subsequently permission was given for some more area, that would not amount to frustration of contract. When the State Government grants the permission for a lesser area of land than the agreed upon area in the agreement by the defendants, plaintiffs could not have elected to purchase the lesser area for which the permission was granted. The plea taken in such a case, that permission for purchase of some area of land granted by the State Government in favour of the plaintiffs was not sufficient for setting up plant could not be allowed, because the State Government and the Department of Industries, taking all relevant aspects into consideration has decided that permission should be granted in favour of the plaintiffs only for purchase of certain extent of land. This fact would clearly indicate that according to the Industries Department, sale of land of 145 bighas in favour of the plaintiffs by the defendants was sufficient to set up the industry for which purpose the plaintiffs have entered into an agreement with the defendants. In such a case, the plea also that due to the breach of contract on the part of the plaintiffs, the sum specified in the agreement which was the earnest money and advance shall be forfeited towards loss of compensation, cannot be allowed. In such a case, award of interest against the principal amount upto the date of the institution of the suit at 9% and 6% thereafter from the date of institution of case till the date of payment is legal and valid as the said amount has been utilized by the defendants in the liquor business but they have failed to prove not obtaining the sale deed in respect of the land agreed upon to be sold in favour of the plaintiffs to the extent of area for which permission was granted by the State Government. Therefore, the award of interest at the rate of 6% per annum on the amount decreed by the Court from the date of institution of the suit was not liable to set aside. [**Gian Chand vs. M/s. York Exports Ltd., AIR 2014 SC 3584**]

**S. 72 and Banking Regulation Act (1949),Sec. 6—Money paid by mistake—**

International banking—International fund transfer—Domestic bank (State Bank of India) maintaining “Nostro” account with foreign bank (Bank of America)—Export of goods by appellant—Documents then submitted by appellant in overseas branch of said domestic bank—Foreign bank crediting money in “Nostro” account to Domestic bank—Domestic bank paying money to appellant—But “swift” message advising actual transfer of funds to another domestic bank with which appellant had no account—Foreign bank therefore, recalling money from said domestic bank—Domestic bank, overseas branch debiting appellant’s account after two years on ground that it was wrongly deposited in appellant’s account—Improper—It was also impossible for appellant to recover amount from importer who had already paid amount. [Metro Exporters P. Ltd. vs. State Bank of India, AIR 2014 SC 3206]

**S. 72 - Restitution- Recovery of amount paid in excess without fault of recipient party**

**Held**-Affirmative Law laid down in **Chandi Prasad Uniyal, (2012) 8 SCC 417**, held the same is permissible. Any amount paid/received without authority of law can always be recovered.

In Shyam Babu Verma case, the Supreme Court while observing that the petitioners therein were not entitled to the higher pay scales, had come to the conclusion that since the amount has already been paid to the petitioners, for no fault of theirs, the said amount shall not be recovered by the respondent Union of India. In Sahib Ram case, the Supreme Court once again held that although the appellant therein did not possess the required educational qualification, yet the Principal granting him the relaxation had paid his salary on the revised pay scale. The Supreme Court further observed that this was not on account of misrepresentation made by the appellant but by a mistake committed by the Principal. In a fact situation of that nature, the Supreme Court was pleased to observe that the amount already paid to the appellant need not be recovered. The observations made by the Court not to recover the excess amount paid to the appellant therein were, thus, in exercise of its extraordinary powers under Article 142 of the Constitution of India which vest the power in the Supreme Court to pass equitable orders in the ends of justice.

In present case Hon’ble Apex Court held that these batch of matters were placed before the present three-Judge Bench for authoritative pronouncement on the apparent difference of opinion expressed on the one hand in Shyam Babu Verma, (1994) 2 SCC 521 and Sahib Ram, 1995 Sup (1) SCC 18 and on the other hand, in Chandi Prasad Uniyal, (2012) 8 SCC 417.

Reference was return as there was no question of law to be decided.

[State of Punjab v. Rafiq Masih, (2014) 8 SCC 883]

## **Criminal Procedure Code**

### **S. 31—Ambit and scope—Section 31 leaves full discretion with Court to order sentences to run concurrently**

Under Section 31 Cr.P.C. it is left to the full discretion of the Court to order the sentences to run concurrently in case of conviction for two or more offences. It is difficult to lay down any straitjacket approach in the matter of exercise of such discretion by the courts. By and large, trial courts and appellate courts have invoked and exercised their discretion to issue directions for concurrent running of sentences, favouring the benefit to be given to the accused. Whether a direction for concurrent running of sentences ought to be issued in a given case would depend upon the nature of the offence or offences committed and the facts and circumstances of the case. The discretion has to be exercised along the judicial lines and not mechanically.

Accordingly, Court answer the Reference by holding that Section 31 Cr.P.C. leaves full discretion with the Court to order sentences for two or more offences at one trial to run concurrently, having regard to the nature of offences and attendant aggravating or mitigating circumstances. Court do not find any reason to hold that normal rule is to order the sentence to be consecutive and exception is to make the sentences concurrent. Of course, if the Court does not order the sentence to be concurrent, one sentence may run after the other, in such order as the Court may direct. Court also do not find any conflict in earlier judgment in Mohd. Akhtar Hussain and Section 31 Cr.P.C. [O.M. Cherian @Thankachan vs. State of Kerala, 2014 (8) Supreme 40]

### **S. 31—Sentences for several offences in one trial—Person was sentenced of conviction of several offences, including one that of life imprisonment—Proviso to S.31(2) shall come into play—No consecutive sentence can be imposed in such case—Therefore order imposing the sentence u/s. 376(f)/302/201, IPC to run consecutively—Illegal.**

Section 31 of Cr.P.C. relates to sentence in cases of conviction of several offences at one trial. Proviso to sub-section (2) to Section 31 lays down the embargo where the aggregate punishment of prisoner is for a period of longer than 14 years. In view of the fact that life imprisonment means imprisonment for full and complete span of life, the question of consecutive sentences in case of conviction for several offences at one trial does not arise. Therefore, in case a person is sentenced on conviction of several offences,

including one that of life imprisonment, the proviso to Section 31(2) shall come into play and no consecutive sentence can be imposed. [**Duryodhan Rout vs. State of Orissa, AIR 2014 SC 3345**]

### **Ss. 41, 41-A and 57**

#### **Directions Issued for Police Officers State Government and Magistrates- As a safe guard to avoid arbitrary arrest and detention-**

The petitioner apprehends his arrest in a case under Section 498-A of the Penal Code, 1860 (hereinafter called as “**I.P.C.**”) and Section 4 of the Dowry Prohibition Act, 1961. The maximum sentence provided under Section 498-A is imprisonment for a term which may extend to three years and fine whereas the maximum sentence provided under Section 4 of the Dowry Prohibition Act is two years and with fine.

#### **Hon’ble Apex court issued following directions-**

- (i) All the State Governments to instruct its police officers not to automatically arrest when a case under Section 498-A of the I.P.C. is registered but to satisfy themselves about the necessity for arrest under the parameters laid down above flowing from Section 41, Cr.P.C.; All police officers be provided with a check list containing specified sub-clauses under Section 41(1)(b)(ii);
- (ii) The police officer shall forward the check list duly filed and furnish the reasons and materials which necessitated the arrest, while forwarding/producing the accused before the Magistrate for further detention;
- (iii) The Magistrate while authorising detention of the accused shall peruse the report furnished by the police officer in terms aforesaid and only after recording its satisfaction, the Magistrate will authorise detention;
- (iv) The decision not to arrest an accused, be forwarded to the Magistrate within two weeks from the date of the institution of the case with a copy to the Magistrate which may be extended by the Superintendent of police of the district for the reasons to be recorded in writing;
- (v) Notice of appearance in terms of Section 41A of Cr.P.C. be served on the accused within two weeks from the date of institution of the case, which may be extended by the Superintendent of Police of the District for the reasons to be recorded in writing;

**[Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273]**

**S. 125—Maintenance—Obligation of husband to maintain wife and children—Not limited to sustain them as animals—Husband had to maintain them in same status as they were before—Duty to provide maintenance has to be fulfilled even by earning money by physical labour.**

Section 125 was conceived to ameliorate the agony, anguish, financial suffering of a woman who left her matrimonial home for the reasons provided in the provision so that some suitable arrangements can be made by the Court and she can sustain herself and also her children if they are with her. The concept of sustenance does not necessarily mean to lead the life of an animal, feel like an unperson to be thrown away from grace and roam for her basic maintenance somewhere else. She is entitled in law to lead a life in the similar manner as she would have lived in the house of her husband. That is where the status and strata come into play, and that is where the obligations of the husband, in case of a wife, become a prominent one. In a proceeding of this nature, the husband cannot take subterfuges to deprive her of the benefit of living with dignity. Regard being had to the solemn pledge at the time of marriage and also in consonance with the statutory law that governs the field, it is the obligation of the husband to see that the wife does not become a destitute, a beggar. A situation is not to be maladroitly created whereunder she is compelled to resign to her fate and think of life “dust unto dust”. It is totally impermissible. In fact, it is the sacrosanct duty to render the financial support even if the husband is required to earn money with physical labour, if he is able bodied. There is no escape route unless there is an order from the Court that the wife is not entitled to get maintenance from the husband on any legally permissible grounds. [Bhuvan Mohan Singh vs. Meena and Others, 2014 Cri.L.J. 3979 (SC)]

**S.167—Statutory bail—Grant of—Initial period for filing charge-sheet is 90 days—Prosecution neither filed charge-sheet prior to date of expiry of 90 days—Nor filed an application for extension of its time—Asking accused to file a rejoinder affidavit to application for extension of time filed subsequently—Is improper—Application for statutory bail has to be decided on same date it is filed**

When the charge-sheet is not filed and the right has ripened earning the status of indefeasibility, it cannot be frustrated by the prosecution on some pretext or the other. The accused can avail his liberty only by filing application stating that the statutory period for filing of the challan has expired, the same has not yet been filed and an indefeasible right has accrued in his favour and further he is prepared to furnish the bail bond. Once such an application is filed, it is obligatory on the part of the court to verify from the records as well as

from the public prosecutor whether the time has expired and the charge- sheet has been filed or not or whether an application for extension which is statutorily permissible, has been filed.

In the present case, respondent arraigned as an accused for offences punishable under Ss. 302, 304, 353, 323, 149, 145 and 147 of Penal Code and under S. 145 and 147 of Penal Code and under S. 25 of Arms Act and under S. 49(2)(b) of POTA was arrested in course of investigation and was arrested in course of investigation and was sent to Judicial Custody prior to the date of expiry of 90 days which is the initial period for filing the charge-sheet, the prosecution neither had filed the charge-sheet nor had it filed an application for extension. After the accused respondent filed the application, the prosecution submitted an application seeking extension of time for filing of the charge-sheet. The day the accused filed the application for benefit of the default provision as engrafted under proviso to sub-section (2) of Section 167 Cr.P.C. the Court required the accused to file a rejoinder affidavit by the time the initial period provided under the statute had expired. There was no question of any contest as if the application for extension had been filed prior to the expiry of time. The adjournment by the Magistrate was misconceived. He was obliged on that day to deal with the application filed by the accused as required under Section 167 (2) CrPC. It could be said that such procrastination frustrates the legislative mandate. A Court cannot act to extinguish the right of an accused if the law so confers on him. Law has to prevail. The prosecution cannot avail such subterfuges to frustrate or destroy the legal right of the accused. Such act is not permissible. Thus, the order of the High Court in overturning the order refusing bail and extending the benefit to the respondent is proper.

Pragnya Singh Thakur vs. State of Maharashtra, AIR 2011 SC (Supp) 755, Not a good law.

Udai Mohanlal Acharya vs. State of Maharashtra, AIR 2011 SC 1910, Followed. [**Union of India through C.B.I. vs. Nirala Yadav @ Raja Ram Yadav @ Deepak Yadav, AIR 2014 SC 3036**]

**Sec. 167(2)—Requirements for statutory bail u/s. 167(2) Cr.P.C.—When all requisite sanction as required u/s. 18 and 18A of the Unlawful Activities Prevention Act (UAPA) obtained and charge sheet is complete in all respects, accused will not be entitled to statutory bail u/s. 167(2) Cr.P.C.**

Charge-sheet was filed by the NIA on 19.10.2013 against the petitioners. The charge-sheet, inter alia, stated the allegations against each of the petitioners and the materials on the basis of which such allegations were leveled. It also stated in paragraphs 18.2 and 18.3 that requisite sanction under

Sections 18 and 18A of the UAPA was accorded by the Ministry of Home Affairs, Government of India, vide order dated 17.10.2013 and also that sanction under Section 7 of the Explosive Substances Act was accorded by the District Magistrate, Kannur vide his order dated 15.10.2013.

The petitioners filed Criminal M.C. No.100 of 2013 on 22.10.2013 before the learned Special Court, NIA Cases. The submissions were negated by the learned Special Court holding that the petitioners were not entitled to statutory bail under Section 167 (2) Cr.P.C.

The requisite sanctions as required under Sections 18 and 18A of the UAPA and so also under Section 7 of the Explosive Substances Act were also accorded by the concerned authorities. The charge-sheet so filed before the learned Special Court was complete in all respects so as to enable the learned Special Court to take cognizance in the matter. Merely because certain facets of the matter called for further investigation it does not deem such report anything other than a final report. In our opinion Section 167(2) of Cr.P.C. stood fully complied with and as such the petitioners are not entitled to statutory bail under Section 167(2) of Cr.P.C. [**Abdul Azeez P.V. vs. National Investigation Agency, 2014 (8) Supreme 193**]

**S.190—Cognizance—FIR lodged against appellants—Final report of investigation showing no case made out—Magistrate even though accepted final report can take cognizance on protest/complaint petition.**

Whether a Magistrate after accepting a negative final report submitted by the Police can take action on the basis of the protection filed by the complainant/first informant? The above question having been answered in the affirmative by the Allahabad High Court, this appeal has been filed by the accused.

The view expressed by this Court in *Gopal Vijay Verma vs. Bhuneshwar Prasad Sinha & Others, 1982(3) SCC 510* has been followed in *Mahesh Chand vs. B.Janardhan Reddy & Anr., 2003(1) SCC 734 (Para 12): AIR 2003 SC 702*, and also in a somewhat recent pronouncement in *Kishore Kumar Gyanchandani vs. G.D.Mehrotra & Anr, 2011 (15) SCC 513*. The clear exposition of law in para 12 of Mahesh Chand (supra) which is extracted below would leave no manner of doubt that the answer to the question posed by the High Court is correct.

“There cannot be any doubt or dispute that only because the Magistrate has accepted a final report, the same by itself would not stand in his way to take cognizance of the offence on a protest/complaint petition; but the question which is required to be

posed and answered would be as to under what circumstances the said power can be exercised.”

**[Rakesh vs. State of U.P., AIR 2014 SC 3509]**

**S. 190(1)(a) and (b) – Power of Magistrate – on accepting the final report, the court does not become functus officio. It can proceed treating the police report or initial complaint as the basis for further action/enquiry in the allegations leveled therein**

This Court in *H.S. Bains vs. State (Union Territory of Chandigarh)* 1982 (3) SCC 510 wherein it was held that after receipt of the police report under Section 173, the Magistrate has three options –

“(1) he may decide that there is no sufficient ground for proceeding further and drop action;

(2) he may take cognizance of the offence under Section 190 (1)(b) on the basis of the police report and issue process; this he may do without being bound in any manner by the conclusion arrived at by the police in their report;

(3) he may take cognizance of the offence under Section 190(1)(a) on the basis of the original complaint and proceed to examine upon oath the complainant and his witnesses under Section 200. If he adopts the third alternative, he may hold or direct an inquiry under Section 202 if he thinks fit. Thereafter he may dismiss the complaint or issue process, as the case may be.”

The second and third options available to the Magistrate as laid down in *H.S. Bains (supra)* has been referred to and relied upon in subsequent decisions of this Court to approve the action of the Magistrate in accepting the final report and at the same time in proceeding to treat either the police report or the initial complaint as the basis for further action/enquiry in the matter of the allegations levelled therein. Reference in this regard may be made to the decision of this Court in *Gangadhar Janardan Mhatre vs. State of Maharashtra & Ors.*, 2004 (7) SCC 768. The following view may be specifically noted -

“.....The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though

it is open to him to act under Section 200 or Section 202 also.

The view expressed by this Court in Gopal Vijay Verma (supra) has been followed in Mahesh Chand vs. B.Janardhan Reddy & Anr. ,2003 (1) SCC 734, and also in a somewhat recent pronouncement in Kishore Kumar Gyanchandani vs. G.D.Mehrotra & Anr.,2011 (15) SCC 5131. The clear exposition of law in para 12 of Mahesh Chand (supra) which is extracted below would leave no manner of doubt that the answer to the question posed by the High Court is correct.

“There cannot be any doubt or dispute that only because the Magistrate has accepted a final report, the same by itself would not stand in his way to take cognizance of the offence on a protest/complaint petition; but the question which is required to be posed and answered would be as to under what circumstances the said power can be exercised.” (**Rakesh and another v. State of U.P., 2014 (7) Supreme 286**)

**S.197—Attractibility of—A public servant enters into criminal conspiracy or indulge in criminal misconduct while discharging his official duties—Such misdemeanor not to be treated as an act in discharge of official duties, so provision of the code will not be attracted**

The sanction, however, is necessary if the offence alleged against public servant is committed by him “while acting or purporting to act in the discharge of his official duties”. In order to find out as to whether the alleged offence is committed while acting or purporting to act in the discharge of his official duty, following yardstick is provided by this Court in Dr. Budhikota Subbarao (supra) in the following words:

“If on facts, therefore, it is prima facie found that the act or omission for which the accused was charged had reasonable connection with discharge of his duty then it must be held to be official to which applicability of Section 197 of the Code cannot be disputed.”

This principle was explained in some more detail in the case of [Raghunath Anant Govilkar v. State of Maharashtra](#), which was decided by this Court on 08.02.2008 in SLP (Crl.) No.5453 of 2007, in the following manner:

“On the question of the applicability of Section 197 of the Code of Criminal Procedure, the principle laid down in two cases, namely, [Shreekantiah Ramayya Munipalli v. State of Bombay and Amrik Singh v. State of Pepsu](#) was as follows:

It is not every offence committed, by a public servant that

requires sanction for prosecution under Section 197 (1) of Criminal Procedure Cod; nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary.

The real question therefore, is whether the acts complained of in the present case were directly concerned with the official duties of the three public servants. As far as the offence of criminal conspiracy punishable under Sections 120-B read with Section 409 of the Indian Penal Code is concerned and also Section 5(2) of the Prevention of Corruption Act, are concerned they cannot be said to be of the nature mentioned in Section 197 of the Code of Criminal Procedure. To put it shortly, it is no part of the duty of a public servant, while discharging his official duties, to enter into a criminal conspiracy or to indulge in criminal misconduct. Want of sanction under Section 197 of the Code of Criminal Procedure is, therefore, no bar.”

The ratio of the aforesaid cases, which is clearly discernible, is that even while discharging his official duties, if a public servant enters into a criminal conspiracy or indulges in criminal misconduct, such misdemeanor on his part is not to be treated as an act in discharge of his official duties and, therefore, provisions of Section 197 of the Code will not be attracted. In fact, the High Court has dismissed the petitions filed by the appellant precisely with these observations namely the allegations pertain to fabricating the false records which cannot be treated as part of the appellants normal official duties. The High Court has, thus, correctly spelt out the proposition of law. The only question is as to whether on the facts of the present case, the same has been correctly applied. [**Rajib Ranjan vs. R. Vijaykumar, 2014 (8) Supreme 195**]

**S. 313—Defective examination of accused u/s. 313 does not by itself vitiate the trial unless accused is seriously prejudicial thereby**

The decisions of this Court quoted hereinabove would show the consistent view that a defective examination of the accused under Section 313 Cr.P.C. does not by itself vitiate the trial. The accused must establish prejudice thereby caused to him. The onus is upon the accused to prove that by reason of his not having been examined as required by Section 313 he has been seriously prejudiced.

The accused persons were fully aware about all these evidences. The appellants did not raise the question before the trial court that any prejudice has

been caused to them in examination under Section 313 Cr.P.C. The burden is on the accused to establish that by not apprising all the incriminating evidences and the inculpatory material that had come in the prosecution evidence against them, prejudice has been caused resulting in miscarriage of justice. In the instant case, Court is of the definite view that no prejudice or miscarriage of justice has been done to the appellants. [**Liyakat vs. State of Rajasthan, 2014 (8) Supreme 68**]

**Sec. 320 & 482—Penal Code (45 of 1860), S. 307—Attempt to murder—Compounding of offence—Accused armed with sword inflicted blows on head of complainant—Attack continued till timely arrival of brother of complainant and another lady who rescued complainant—Injuries inflicted on complainant were very serious in nature—Settlement arrived at between parties—Offence u/s. 307 is not compoundable—Order of High Court quashing proceedings on basis of compromise—Not proper.**

FIR No. 171 of 2013 registered against respondent No. 1 and 2 at police Station Kotwali, Vidisha (M.P.) u/s. 307 IPC r/w. Sec. 34 IPC. Charge sheet filed on 06.04.2013—respondent filed miscellaneous criminal case 3527 of 2013 in the High Court of Madhya Pradesh, Gwalior Bench u/s. 482 of Cr.P.C. for quashing the criminal proceedings, arising out of the FIR No. 171 of 2013 on the basis of compromise registered on 12.03.2013. The High Court accepted the compromise, quashed the proceedings and referred to the judgment of the Supreme Court in *Shiji @ Pappu and Others vs. Radhika and Another, 2011 (10) SCC 705; AIR 2012 SC 499*. State of M.P. filed criminal appeal No. 1985 of 2014 against the judgment and order dated 10.5.2013 passed by the High Court.

After examining the facts of this case and the medical record, the Supreme Court held that it was not a case where High Court should have quashed the proceedings in exercise of its discretion under Section 482 of the Code.

The Court referred its judgments in *Gulabdas & Ors. v. State of M.P.; 2011 (12) SCALE 625; State of Rajasthan v. Shambhu Kewat, (2014) 4 SCC 149; Gian Singh v. State of Punjab, (2012) 10 SCC 303* and held that it is noticeable that in some cases offences under Section 307 IPC are allowed to be compounded, whereas in some other cases it is held to be contrary. This dichotomy was taken note of by referring to those judgments, in the case of *Narinder Singh & Ors. v. State of Punjab & Anr., (2014) 6 SCC 466*, and by reconciling those judgments, situations and circumstances were discerned where compounding is to be allowed or refused. To put it simply, it was pointed out as to under what circumstances the Courts had quashed the proceedings acting upon the settlement arrived at between the parties on the one hand and what were the reasons which had persuaded the Court not to exercise such a discretion. After thorough and detailed discussion on various facets and after revisiting the entire law on the subject, following principles have culled out in the said decision:

“29. In view of the aforesaid discussion, we sum up and lay down the

following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:

29.1. Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

- (i) ends of justice, or
- (ii) to prevent abuse of the process of any court.

While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not to be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for the offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by public servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other hand, those criminal cases having overwhelmingly and predominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him

by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore are to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used, etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the latter case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage, the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge-sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and

to come to a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime.”

The Court concluded that when we apply the ratio/principle laid down in the said case to the facts of the present case, we find that the injuries inflicted on the complainant were very serious in nature. The accused was armed with sword and had inflicted blows on the forehead, ear, back side of the head as well as on the left arm of the complainant. The complainant was attacked five times with the sword by the accused person out of which two blows were struck on his head. But for the timely arrival of brother of the complainant and another lady named Preeti, who rescued the complainant, the attacks could have continued. In a case like this, the High Court should not have accepted the petition of the accused under Section 482 of the Code. [**State of Madhya Pradesh vs. Deepak & Others, 2014 Cr.L.J. 4509 (SC)**]

**Ss. 320, 482 – Compounding of offences – Inherent powers – FIR lodged against appellants for offences under Ss. 326 and 307 of Penal Code which are non-compoundable offences—Affidavit filed by complainant stating about filing of compromise petition – Also stating that appellants are neighbours and that they are living peacefully—In view of compromise, proceedings against appellants, quashed.**

Offences which are non-compoundable cannot be compounded by the court. Courts draw the power of compounding offences from Section 320 of the Code. The said provision has to be strictly followed. However, in a given case, the High Court can quash a criminal proceeding in exercise of its power under Section 482 of the Code having regard to the fact that the parties have amicably settled their disputes and the victim has no objection, even though the offences are non-compoundable. In which cases the High Court can exercise its discretion to quash the proceedings will depend on facts and circumstances of each case. Offences which involve moral turpitude, grave offences like rape, murder etc. cannot be effaced by quashing the proceedings because that will have harmful effect on the society. Such offences cannot be said to be restricted to two individuals or two groups. If such offences are quashed, it may send wrong signal to the society. However, when the High

Court is convinced that the offences are entirely personal in nature and, therefore, do not affect public peace or tranquility and where it feels that quashing of such proceedings on account of compromise would bring about peace and would secure ends of justice, it should not hesitate to quash them. In such cases, the prosecution becomes a lame prosecution. Pursuing such a lame prosecution would be waste of time and energy. That will also unsettle the compromise and obstruct restoration of peace. In the present case affidavit has been filed by complainant stating that a compromise petition has been filed in the lower court. It is further stated that he and the appellants are neighbours, that there is harmonious relationship between the two sides and that they are living peacefully. He has further stated that he does not want to contest the present appeal and he has no grievance against the appellants. Held, in view of the compromise, proceeding against appellants quashed. [Yogendra Yadav and Others vs. The State of Jharkhand, 2014 Cri.L.J. 3935 (SC)]

**S.357-A – Victim compensation – Factors to be considered for determining compensation stated.**

Court has informed that 25 out of 29 State Governments have notified victim compensation schemes. The scheme specify maximum limit of compensation and subject to maximum limit, the discretion to decide the quantum has been left with the State/District legal authorities. It has been brought to our notice that even though almost a period of five years has expired since the enactment of Section 357A, the award of compensation has not become a rule and interim compensation, which is very important, is not being granted by the Courts. It has also been pointed out that the upper limit of compensation fixed by some of the States is arbitrarily low and is not in keeping with the object of the legislation.

We are of the view that it is the duty of the Courts, on taking cognizance of a criminal offence, to ascertain whether there is tangible material to show commission of crime, whether the victim is identifiable and whether the victim of crime needs immediate financial relief. On being satisfied on an application or on its own motion, the Court ought to direct grant of interim compensation, subject to final compensation being determined later. Such duty continues at every stage of a criminal case where compensation ought to be given and has not been given, irrespective of the application by the victim. At the stage of final hearing it is obligatory on the part of the Court to advert to the provision and record a finding whether a case for grant of compensation has been made out and, if so, who is entitled to compensation and how much. Award of such compensation can be interim. Gravity of offence and need of

victim are some of the guiding factors to be kept in mind, apart from such other factors as may be found relevant in the facts and circumstances of an individual case. We are also of the view that there is need to consider upward revision in the scale for compensation and pending such consideration to adopt the scale notified by the State of Kerala in its scheme, unless the scale awarded by any other State or Union Territory is higher. The States of Andhra Pradesh, Madhya Pradesh, Meghalaya and Telangana are directed to notify their schemes within one month from receipt of a copy of this order. We also direct that a copy of this judgment be forwarded to National Judicial Academy so that all judicial officers in the country can be imparted requisite training to make the provision operative and meaningful. **Suresh & Anr. v. State of Haryana, 2014(8) Supreme 289.**

**S. 378—If the view taken by the trial Court is a possible view, High Court ought not to interfere**

Hon'ble Supreme Court gone through the judgment of the trial court and the High Court and carefully perused the evidence on record. It may be mentioned that as found by both the courts below the offence under Section 376 was not established at all. The reasons given by the trial court while acquitting the appellant, in Court view, are quite sound and in any case, such view is definitely a possible view. The conclusions reached by the trial court cannot be said to be palpably wrong or based on erroneous view of the law, so as to call for interference by the High Court. In our considered view the High Court was not justified in converting the case to that of attempt to commit rape and recording order of conviction. Court, therefore, set aside the judgment and order of conviction passed by the High Court and restore that of the trial court acquitting the accused-appellant of the offences with which he was charged. **[Krishna @Krishnappa vs. State of Karnataka, 2014 (8) Supreme 1]**

**S. 438—Anticipatory bail—Grant of—Parameters or factor to be considered for granting anticipatory bail**

Sub-section (1) of Section 438 has been amended by Cr.P.C. (Amendment) Act 2005 (Act 25 of 2005), by which old sub-section (1) has been substituted by new sub-sections (1), (1A) and (1B). The guiding factors for grant of anticipatory bail have been mentioned in sub-section (1) of Section 438 itself. The Court would grant or refuse anticipatory bail after taking into consideration the following factors, namely:-

- (i) the nature and gravity of the accusation;
- (ii) the antecedents of the applicant including the fact as to whether he

has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

- (iii) the possibility of the applicant to flee from justice; and
- (iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested.

Anticipatory bail is not to be granted as a matter of rule, but should be granted only when a special case is made out and the Court is convinced that the accused would not misuse his liberty. After analysing various judgments and guidelines in [Siddharam Satlingappa Mhetre vs. State of Maharashtra and Ors.](#), (2011) 1 SCC 694, this Court has enumerated the parameters that can be taken into consideration by the courts while dealing with the anticipatory bail.

When the Special Leave Petitions came up for hearing, by order dated 9.5.2014 interim protection from arrest was granted to the appellant- accused and without prejudice to the contentions, the appellant was directed to deposit a sum of rupees one crore in the Registry of the Supreme Court and in compliance of the said order, the appellant has deposited rupees one crore. Since the transaction is in the nature of commercial transaction and since the appellant has also shown his bonafide by depositing rupees one crore, pending further investigation, in our view, anticipatory bail could be granted to the appellant. [**Rakesh Baban Borhade vs. State of Maharashtra, 2014 (8) Supreme 65**]

**S.439 – Bail – Factors to be considered while granting bail – while granting bail court has to see whether there is likelihood of offence being repeated and also whether there is danger, of justice being thwarted by grant of the bail.**

In this context, court may profitably refer to the dictum in *Prasanta Kumar Sarkar v. Ashis Chatterjee*, (2010)14 SCC 496 wherein it has been held that normally this Court does not interfere with the order passed by the High Court when a bail application is allowed or declined, but the High Court has a duty to exercise its discretion cautiously and strictly. Regard being had to the basic principles laid down by this Court from time to time, the Court enumerated number of considerations and some of the considerations which are relevant for the present purpose are; whether there is likelihood of the offence being repeated and whether there is danger of justice being thwarted by grant of bail. [**Neeru Yadav vs. State of U.P. and another, 2014(8) Supreme 579**]

**S. 439(2), 437(5) and 362- Review/Recall/Quashment of bail order distinguished from cancellation of bail order. Scope of power as to**

## **cancellation of bail.**

The concept of setting aside an unjustified, illegal or perverse order granting bail is different from the concept of cancellation of a bail on the ground of accused's misconduct or new adverse fact having surfaced after the grant of bail which require such cancellation and a perusal of the decisions of the Supreme Court would show that an order granting bail can only be set aside on grounds of being illegal or contrary to law by the court superior to the court which granted the bail and not by the same court.

It is an accepted principle of law that when a matter has been finally disposed of by a court, the court is, in the absence of a direct statutory provision, becomes *functus officio* and cannot entertain a fresh prayer for relief in the matter unless and until the previous order of final disposal has set aside or modified to that extent. It is also settled law that the judgment and order granting bail cannot be reviewed by the court passing such judgment and order in the absence of any express provision in Cr.P.C for the same. Section 362 Cr.P.C. operates as a bar to any alteration or review of the cases disposed of by the court. The singular exception to the said statutory bar is correction of clerical or arithmetical error by the court.

In the instant case, the order for bail passed by the High Court in the bail application preferred by the accused-petitioner herein finally disposes of the issue in consideration and grants relief of bail to the applicants therein. Since, no express provision for review of order granting bail exists under the Cr.P.C., the High Court becomes *functus officio* and Section 362 Cr.P.C. applies here barring the review of the judgment and order of the Court granting bail to the petitioner-accused. Even though the cancellation of bail rides on the satisfaction and discretion of the court under Section 439(2) of the Cr.P.C., it does not vest the power of review in the court which granted bail. Even in the light of fact of misrepresentation by the petitioner-accused during the grant of bail, the High Court could not have entertained the respondent/informant's prayer by sitting in review of its judgment by entertaining miscellaneous petition. [**Abdul Basti vs. Mohd. Abdul Kadir Chaudhary, (2014) 10 SCC 754**]

**S. 482—Constitution of India, Art. 226—Quashing of criminal proceedings—Settlement of dispute by parties—Defrauding of bank—Accused alleged to have got issued letter of credit (LC) in name of fictitious companies—And got L.C. discounted by attaching bogus bills—Transaction of which accused are charged—Is financial fraud—It is social wrong and has immense societal impact—Merely because accused had**

**replayed money and bank had issued no due certificate—Criminal proceedings initiated cannot be quashed.**

As per the charge-sheet the respondents had got LCs issued from the bank in favour of fictitious companies propped up by them and the fictitious beneficiary companies had got letters of credits discounted by attaching their bogus bills. The names of 10 fictitious companies have been mentioned in the chargesheet. Thus, allegation of forgery is very much there. As is manifest from the impugned order, the learned Single Judge has not adverted to the same. It is not a simple case where an accused has borrowed money from the bank and diverted it somewhere else and, thereafter, paid the amount. It does not fresco a situation where there is dealing between a private financial institution and an accused, and after initiation of the criminal proceedings he pays the sum and gets the controversy settled. The expose' of facts tells a different story. As submitted by the learned Counsel for CBI the manner in which the letters of credits were issued and the funds were siphoned has a foundation in criminal law. Learned counsel would submit that it does not depict a case which has overwhelmingly and predominatingly civil flavour. The intrinsic character is different. Emphasis is laid on the creation of fictitious companies.

The collective interest of which the Court is the guardian cannot be a silent or a mute spectator to allow the proceedings to be withdrawn, or for that matter yield to the ingenuous dexterity of the accused persons to invoke the jurisdiction under Article 226 of the or under Section 482 of the Code and quash the proceeding. It is not legally permissible. The Court is expected to be on guard to these kinds of adroit moves. The High Court, we humbly remind, should have dealt with the matter keeping in mind that in these kind of litigations the accused when perceives a tiny gleam of success, readily invokes the inherent jurisdiction for quashing of the criminal proceeding. The court's principal duty, at that juncture, should be to scan the entire facts to find out the thrust of allegations and the crux of the settlement. The learned Single Judge has not taken pains to scrutinize the entire conspectus of facts in proper perspective and quashed the criminal proceeding. The said quashment neither helps to secure the ends of justice nor does it prevent the abuse of the process of the Court nor can it be also said that as there is a settlement no evidence will come on record and there will be remote chance of conviction. Such a finding in our view would be difficult to record. [State of Maharashtra Through CBI vs. Vikram Anantrai Doshi, 2014 Cri.L.J. 4879 (SC)]

**S.482 – Applicability of – When a prima facie case is made out, application U/s. 482 Cr.P.C. cannot be allowed.**

Appellant issued 33 cheques during the course of its business aggregating to Rs.2,40,64,022.19 paise to the complainant in consideration of the payment against steel billets and rolled products supplied to them by the complainant/respondent. On presentation, all the cheques were dishonoured on different dates culminating in lodging of 26 complaints against the appellants for the commission of offence punishable under Section 138 of the Negotiable Instruments Act. Upon notice, the appellants filed an application under Section 482 of the Code of Criminal Procedure before the High Court for quashing the said complaints.

Supreme Court has held that when a prima facie case is made out, application u/s. 482 CrPC cannot be allowed. [**K.K.Singhal & Ors. vs. Steel Strips Ltd., 2014(8) Supreme 449**]

**Ss. 482, 154**—Quashing of FIR—Complaint alleging that accused conspired to fraudulently induce complainant to enter into agreement of sale and part with money with no intention to complete sale—Plea that dispute involved is civil dispute and so FIR should be quashed—Not tenable—Stage of investigation is too premature stage for court to declare that it is civil transaction and stall investigation on that ground.

The High Court has adopted a strictly hypertechnical approach and such an endeavour may be justified during a trial, but certainly not during the stage of investigation. At any rate it is too premature a stage for the High Court to step in and shall the investigation by declaring that it is a civil transaction wherein no semblance of criminal offence is involved. [**Mosiruddin Munshi vs. Md. Siraj, AIR 2014 SC 3352**]

#### **S. 482 – Quashment of criminal proceeding – consideration of**

The case of the complainant in the FIR registered on 4th May, 2010 in the Bhelupur Police Station at Varanasi is that her marriage was solemnised on 30th April, 2005. Her brothers who lived abroad gave lot of dowry and cash in the marriage but her family could not fulfil more demands raised by the elder brother of her husband's father, who was the head of the joint family on account of which family members of her husband were not satisfied and tortured her. On account of torture, she came to her parents house with her child on 1st March, 2009 she gave a complaint on 27th April, 2010 leading to registration of the FIR on 4th May, 2010. She also filed complaint in the Court of Additional Chief Judicial Magistrate, Varanasi. In the said complaint, the appellants were summoned vide Order dated 30th November, 2010.

Aggrieved by the said summons, the appellants moved the High Court under Section 482 OF THE Code of Criminal Procedure (Cr.P.C.) with the

plea that the summoning was not justified as neither they were named in the FIR got registered by the complainant nor any individual role was attributed to them in the criminal complaint. Their relationship with the husband of the complainant was remote as grand father of the appellant No.1 was brother of grand father of the husband of the complainant. In such remote relationship, the appellants will have no interest in raising any demand for dowry or causing any harassment to the complainant. Their implication was thus, clear abuse of the process of the Court.

Court have gone through the FIR and the criminal complaint. In the FIR, the appellants have not been named and in the criminal complaint they have been named without attributing any specific role to them. The relationship of the appellants with the husband of the complainant is distant. In *Kans Raj vs. State of Punjab & Ors.*, it was observed:-

A tendency has, however, developed for roping in all relations of the in-laws of the deceased wives in the matters of dowry deaths which, if not discouraged, is likely to affect the case of the prosecution even against the real culprits. In their over enthusiasm and anxiety to seek conviction for maximum people, the parents of the deceased have been found to be making efforts for involving other relations which ultimately weaken the case of the prosecution even against the real accused as appears to have happened in the instant case."

The Court has, thus, to be careful in summoning distant relatives without there being specific material. Only the husband, his parents or at best close family members may be expected to demand dowry or to harass the wife but not distant relations, unless there is tangible material to support allegations made against such distant relations. Mere naming of distant relations is not enough to summon them in absence of any specific role and material to support such role.

The parameters for quashing proceedings in a criminal complaint are well known. If there are triable issues, the Court is not expected to go into the veracity of the rival versions but where on the face of it, the criminal proceedings are abuse of Court's process, quashing jurisdiction can be exercised. (**Kailash Chandra Agrawal v. State of U.P., 2014 (6) Supreme 577**)

## **Criminal Trial**

**Circumstantial evidence – Motive – Consideration of – In circumstantial evidence, motive becomes material consideration and strong circumstance**

Filing of suit on 02.1.2004 about two weeks prior to the occurrence heightens the probability of prosecution case. In cases of circumstantial evidence proof of motive is material consideration and a strong circumstance. (**Paramsivam v. State through Inspector of Police, 2014 (6) Supreme 586**)

**Hostile witness - Even if a witness turns hostile his evidence, if trustworthy, can be relied upon**

The evidence of PW9 also established that the deceased was last seen alive with accused no.1- Paramasivam in Maruthi Omni Van (TN-23 E 5951) near Kinathukadavu Checkpost. In his evidence, PW9 has stated that after taking petrol for TVS- 50 in a Petrol Pump near the Checkpost while he was proceeding along with PW8-Sivakumar, he saw the deceased along with accused no.1-Paramasivam in Maruthi Omni Van (MO1) and saw the others

inside the Van. Since, deceased and accused no.1-Paramasivam were in inimical terms, PW9 wondered as to why accused no.1 and deceased are seen together and he asked PW8-Sivakumar about the same. Though, PW8-Sivakumar turned hostile, evidence of PW9 is trustworthy and we do not find any reason to take a different view. **(Paramsivam v. State through Inspector of Police, 2014 (6) Supreme 586)**

**Criminal Trial – Investigation- Essence of - Skilful enquiry and collection of material and evidence in manner by which potential offenders are not forewarned.**

Held, previous approval from Central Government to conduct inquiry or investigation into any offences alleged to have been committed under PC Act, 1988 by employees of Central Government of level of Joint Secretary and above in terms of S. 6-A of DSPE Act, would result in terms of S. 6-A of DSPE Act, would result in indirectly putting to notice the very officers themselves to be investigated. Thus, there would be no confidentiality and insulation of investigating agency from political and bureaucratic control because approval is to be taken from Central Government which would involve leaks and disclosures at every state. Moreover, if CBI is not even allowed to verify complaints by preliminary enquiry it would not be able to collect material even to move Government for purpose of obtaining previous approval of Central Government. Hence, S.6 –A of DSPE Act is invalid. [**Subramanian Swamy v. C.B.I., (2014) 8 SCC 682**]

**Rule of Law- Facets of rule of law in criminal justice system, held are:** (i) any investigation into crime should be fair, in accordance with law and should not be tainted; and (ii) interested or influential persons should not be able to misdirect or hijack investigation so as to throttle investigation resulting in offenders escaping punitive course If law- Breach of law amounts to negation of equality under Art.14 of Constitution.

Article 14 of the Constitution incorporates the concept of equality and equal protection of laws. The first part of Article 14 is a declaration of equality of the civil rights of all persons within the territories of India and enshrines basic principle of republicanism. The second part, which is a corollary of the first, enjoins that equal protection shall be secured to all such persons in the enjoyment of their rights and liberties without discrimination of favoritism. It is a pledge of the protection of equal laws, that is, laws that operate alike on all persons under like circumstances. [**Subramanian Swamy v. C.B.I., (2014) 8 SCC 682**]

**Evidence Act**

### **Ss.27 and 106 – Attractibility of Sec. 106 of above act.**

This is a case where Section 106 of the Evidence Act is clearly attracted which requires the accused to explain the facts in their exclusive knowledge. No doubt, the burden of proof is on the prosecution and Section 106 is not meant to relieve it of that duty but the said provision is attracted when it is impossible or it is proportionately difficult for the prosecution to establish facts when are strictly within the knowledge of the accused. Recovery of dead bodies from covered gutters and personal belongings of the deceased from other places disclosed by the accused stood fully established. It casts a duty on the accused as to how they alone had the information leading to recoveries which was admissible under Section 27 of the Evidence Act. Failure of the accused to give an explanation or giving of false explanation is an additional circumstance against the accused as held in number of judgments, including *State of Rajasthan vs. Jaggu Ram*, (2008)12 SCC 51.

In view of the above, court not found any ground to interfere with the conviction and sentence of the appellants. The appellants are on bail. They may be taken into custody for undergoing the remaining sentence. [**Suresh & Anr. v. State of Haryana, 2014(8) Supreme 289**]

### **S. 32- Dying declaration – Admissibility of**

The philosophy of law which signifies the importance of a dying declaration is based on the maxim "nemo moriturus prasumitur mennre", which means, "no one at the time of death is presumed to lie and he will not meet his maker with a lie in his mouth". Though a dying declaration is not recorded in the Court in the presence of accused nor it is put to strict proof of cross-examination by the accused, still it is admitted in evidence against the general rule that hearsay evidence is not admissible in evidence. The dying declaration does not even require any corroboration as long as it inspires confidence in the mind of the Court and that it is free from any form of tutoring. At the same time, dying declaration has to be judged and appreciated in the light of surrounding circumstances. The whole point in giving lot of credence and importance to the piece of dying declaration, deviating from the rule of evidence is that such declaration is made by the victim when he/she is on the verge of death. (**Umakant v. State of Chhatisgarh, 2014 (6) Supreme 655**)

**S. 32 - Dying Declaration- It is well settled that a truthful and reliable dying declaration may form the sole basis of conviction even though it is not corroborated- Merely because dying declaration was not in question answer form, the sanctity attached to a dying declaration as it comes from the mouth of a dying person cannot be brushed aside and its reliability**

**cannot be doubted.**

It is well settled that a truthful and reliable dying declaration may form the sole basis of conviction even though it is not corroborated. However, the reliability of declaration should be subjected to close scrutiny and the Courts must be satisfied that the declaration is truthful.

In the case of *K. Ramachandra Reddy v. Public Prosecutor, (1976) 3 SCC 618*, this Court observed that:

“6. The accused pleaded innocence and averred that they had been falsely implicated due to enmity. Thus, it would appear that the conviction of the accused depends entirely on the reliability of the dying declaration Ext. P-2. The dying declaration is undoubtedly admissible under section 32 of the Evidence Act and not being a statement on oath so that its truth could be tested by cross-examination, the Courts have to apply the strictest scrutiny and the closest circumspection to the statement before acting upon it. While grant solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person yet the Court has to be on guard against the statement of the deceased being a result of either tutoring, prompting or a product of his imagination. The Court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rencour. Once the Court is satisfied that the dying declaration is true and voluntary it can be sufficient to found the conviction even without any further corroboration.

The submission of Ms. Meenakshi Arora, learned Senior Counsel appearing for the appellant that the dying declaration is untenable being without mentioning the time when the statement was recorded as also not in the question answer form, cannot be sustained. Merely because dying declaration was not in question answer form, the sanctity attached to a dying declaration as it comes from the mouth of a dying person cannot be brushed aside and its reliability cannot be doubted. [**Prem Kumar Gulati vs. State of Haryana and another, 2014 (87) ACC 885, SC**]

**Secondary Evidence of Electronic Records- Section 65-A, 65-B, 59,62,63 and 65 Evidence Act, 1872-**

Electronic record produced for the inspection of the court is documentary evidence under Section 3 of the Evidence Act, 1872 (the Evidence Act). Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65-A, can be proved only

in accordance with the procedure prescribed under Section 65-B of the Evidence Act. The purpose of these provision is to sanctify secondary evidence in electronic from generated by a computer. The very admissibility of electronic record which is called as “computer output”, depends on the satisfaction of the four conditions prescribed under Section 65-B(2) of the Evidence Act.

Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

The person concerned occupying he responsible official position concerned need only to state in the certificated that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic pen drive, etc., which contains the statement which is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc., without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A – opinion of examiner of electronic evidence.

The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65-B of the

Evidence Act are not complied with, as the law now stands in India. [**Anvar P.V. vs. P.K. Basheer, (2014) 10 SCC 473**]

**S. 115—Estoppel—Doctrine of election—Is based on rule of estoppels—Principle that one cannot approbate and reprobate is inherent in it.**

The doctrine of election is based on the rule of estoppels the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppels by election is one among the species of estoppels in pais (or equitable estoppels), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had. [**State of Punjab vs. Dhanjit Singh, AIR 2014 SC 3004**]

**S. 116—Estoppels—Tenants are stopped from challenging title of landlord, however, title of transferee can be challenged by tenants installed by the transferee**

Chapter VIII of the Evidence Act under the heading ‘Estoppel’ is important for the present purposes. This fasciculus comprises only three provisions, being Sections 115 to 117. For ease of reference we shall reproduce Section 116:-

“116. Estoppel of tenant; and of licensee of person in possession.- No tenant of immovable property, or person claiming through such tenant, shall, during the continuation of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given.”

Plainly, this provision precludes the consideration of any challenge to the ownership of the Trust as the claim for arrears of rent was restricted to the period prior to the sale of the suit land by the Trust to the Transferees, namely Defendants 7 to 9 in O.S.5/78. The position would have been appreciably different, were the said Defendants 7 to 9 to lay any claim against the Tenants for arrears of rent or, for that matter, any other relief. This is for the reason that Section 116 of the Evidence Act would not come into play in any dispute between the Tenants on the one hand and the Transferees on the other. [**Sri Gangai Vinayagar Temple vs. Meenakshi Ammal, 2014 (8) Supreme 133**]

## **Factories Act**

**S.106—Limitation of prosecution—Incident of fire—Preliminary enquiry by Inspector of Factories—Committee constituted subsequently for intensive investigation—Complaint as to offences filed by Inspector within three months of report of committee—Held, barred by limitation as Inspector had acquired knowledge of commission of offence when conducted preliminary enquiry.**

In the instant case at the time of celebration of foundation day of factory, the fire broke out in temporary pandals resulting in casualties and injuries to employees. It has not been disputed at any stage that the complainant was not associated with and did not participate in the preliminary investigation from 5th to 6th March 1989 along with the Chief Inspector of Factories. This is obvious from the letter/report of preliminary investigation dated 08.03.1989. Subsequently committee was constituted for intensive investigation and the Inspector was part of the investigation team. On receipt of report on 23.4.1990, the Inspector filed the complaint regarding offences on 7.5.1990. It was alleged that the complaint has been filed within three months from 23.4.1990 as u/s. 106.

Held, the Inspector must be taken as having acquired knowledge of the alleged commission of the offence soon before or at least on 09.03.1989, when the report of preliminary investigation was sent to the Commissioner of Labour. Thus, it was not necessary for the Inspector to have waited to receive the report on 23.4.1990 from the Government under cover of the letter dated 21.4.1990 directing him to file a complaint for the prosecution of the appellants. The dismissal of complaint being barred by limitation as u/s. 106, was proper. [**J.J. Irani vs. State of Jharkhand, AIR 2014 SC 3735**]

### **Forest (Conservation) Act**

**S.2—Punjab Land Preservation Act, Ss. 3, 4, 5—Forest land—Entire land notified under Punjab Act—Not forest land—As activities regulated, prohibited by Punjab Act on notified land are not normally carried on in forest.**

For the better preservation and protection of any local area, situated within or adjacent to Shivalik Mountain Range which is liable to be affected debodiment of forests in that range or by the action of “cho”, S.3 of Punjab Act empowers State to notify such land. S. 4 of the Punjab Act, 1900 empowers, the local Government by general or special order, temporarily or permanently to regulate, restrict or prohibit various activities mentioned in clauses (a), (b), (c), (d), (e), (f) and (g) thereof. A reading of these clauses would show that activities such as cultivation, pasturing of sheep and goats and erection of buildings by the

inhabitants of towns and villages situated within the limits of the area notified u/s. 3 can be regulated, restricted or prohibited by a general or special order of the local Government. All these activities are not normally carried on in forests. Similarly, under Section 5 of the PLP Act, 1900, the local Government was empowered by special order, temporarily or permanently to regulate, restrict or prohibit the cultivating of any land or to admit, herd, pasture or retain cattle generally other than sheep and goats. These activities are also not normally carried on in forests. It is therefore clear that the land which is notified u/s. 3 of the PLP Act, 1900 and regulated by orders of the local Government u/ss. 4 and 5 of the PLP Act, 1900 may or may not be 'forest land'. [**B.S. Sandhu vs. Government of India, AIR 2014 SC 3409**]

### **Gujarat Tenancy and Agricultural Lands Act**

**S.43—Constitution of India, Art. 300A—Transfer of agricultural land held by deemed purchaser for non-agricultural use—Requirement of payment of premium and prior sanction—Premium charged is neither tax nor fee—It is consideration for grant of sanction.**

The requirement of payment of premium by deemed purchaser for getting sanction to transfer his agricultural land for non-agricultural purpose is not invalid. The premium charged is neither tax nor fee. The tenant holds the land under State and the premium charged is for granting the sanction. This is because under this welfare statute these lands have been permitted to be purchased by the tenants at a much lesser price. The tenant is supposed to cultivate the land personally. It is not to be used for non agricultural purpose. A benefit is acquired by the tenant under the scheme of the statute, and therefore, he must suffer the restrictions which are also imposed under the same statute. The idea in insisting upon the premium is also to make such transfers to non-agricultural purpose unattractive. The intention of the statute is reflected in Section 43, and if that is the intention of the Legislature there is no reason why it should be held otherwise.

Plea that the premium charged is unconscionable and is expropriator not tenable in view of scheme of the Act. [**Gohil Jesangbhai Raysangbhai vs. State of Gujarat, AIR 2014 SC 3687**]

### **Hindu Marriage Act**

**S.5—Marriage—Proof—Documentary evidence—Temple receipt procured from Trustee of Temple—Not mentioning anything about marriage ceremony or conduct and solemnization of marriage—Voters list produced not reliable—There could be no presumption of marriage u/s. 114 of Evidence Act because of factor of long cohabitation—Thus finding that no marriage took place**

between parties—Not interfered with. [**Easwari vs. Parvathi and others, AIR 2014 SC 2912**]

**S. 13(1)(ia)—Irretrievable breakdown of marriage is no ground for divorce—Only Supreme Court can grant relief exercising power under Article 142**

Irretrievable breakdown of marriage as a ground for divorce has not found statutory acceptance till date. Under [Article 142](#) of the [Constitution](#), the Supreme Court has plenary powers “to pass such decree or make such order as is necessary for doing complete justice in any case or order pending before it”. This power, however, has not been bestowed by our Constitution on any other Court. It is for these reasons that we have confined arguments only to the aspect of whether the filing of a false criminal complaint sufficiently proves matrimonial cruelty as would entitle the injured party to claim dissolution of marriage. It will be relevant to mention that the Law Commission of India in its Reports in 1978 as well as in 2009 has recommended the introduction of irretrievable breakdown of marriage as a ground for dissolution of marriage; the Marriage Laws (Amendment) Bill, 2013 incorporating the ground has even received the assent of the Rajya Sabha. It is, however, highly debatable whether, in the Indian situation, where there is rampant oppression of women, such a ground would at all be expedient. But that controversy will be considered by the Lok Sabha. [**K. Srinivas vs. K. Sunita, 2014 (8) Supreme 36**]

**Indian Penal Code**

**Ss. 34 and 120-B – Essential ingredients – when cannot be ground for conviction – merely because a person is in the company of accused persons, he cannot be roped- in with the aid of Section 34 and 120-B**

PW-1 – Dr. Sharda Prasad Tripathi is the husband of accused Shashi Tripathi. On 25.11.2003, when PW-1 – Dr. Sharda Prasad Tripathi came home from his clinic, found that his daughter-in-law Bhavna Tripathi has been murdered. He lodged a First Information Report (F.I.R.) on 25.11.2003 at about 20:45 hours. The crime was registered. He deposed in court that on 25.11.2003, when he returned home, he found servant Anil Kumar (PW-21) was weeping. When he went inside, he found his daughter-in-law - Bhavna and wife - Shashi lying in the courtyard. Bhavna was dead. Shashi was unconscious. There were numerous injuries, including incised wounds on Bhavna, none on Shashi.

Accused Shashi Tripathi is the step mother-in-law of deceased Bhavna Tripathi. Bhavna was married to her step son – Jitendra Kumar in July, 2003.

Shashi Tripathi used to be annoyed with Bhavna Tripathi on account of some domestic dispute. She engaged the other accused for murdering Bhavna.

Shashi Tripathi, Mahesh and Binu @ Chandra Prakash were arrested on 29.11.2003. A bloodstained knife was taken into possession. The accused Raju @ Devendra Choubey was taken into custody on 22.12.2003.

Trial Court convicted all accused persons u/s 302 r/w 34 IPC. Conviction was maintained by the High Court.

On a careful conspectus of the facts and the law, court is of the view that the prosecution has failed to prove the guilt of Mahesh beyond reasonable doubt. There is no evidence of his having played any part in the crime. He was merely seen by the witness as standing outside the house when the witness came home. Mahesh did not even act as a guard; he did not prevent Anil Kumar (PW-21) from entering the house. There is no evidence of the formation or sharing of any common intention with the other accused. There is no reference to a third person in the FIR; no evidence that he came with the other accused or left with them. No weapon was seized from him, nor was any property connected with the crime, seized. Having regard to the role attributed to him and the absence of incriminating factors Court found that it is not safe to convict Mahesh of the offence of murder with the aid of Sections 34 and 120(B). **(Raju @ Devendra Choubey v. State of Chhatisgarh, 2014 (7) Supreme 290)**

**Ss. 55, 302—Criminal Procedure Code, Ss. 433, 433A—“imprisonment for life”-- Means for entire life of prisoner—Unless commuted by appropriate Govt. in terms of S. 55, IPC and Ss. 433, 433A of Cr.P.C.**

Imprisonment for life is not confined to 14 years of imprisonment. A reading of S.55, IPC and Ss. 433, 433A Cr.P.C. would indicate that only the appropriate Government can commute the sentence for imprisonment of life.

A sentence of imprisonment for life means a sentence for entire life of the prisoner unless the appropriate Government chooses to exercise its discretion to remit either the whole or a part of the sentence under the provisions of the Criminal Procedure Code. **[Duryodhan Rout vs. State of Orissa, AIR 2014 SC 3345]**

**S. 149—Essential of—Once an assembly is held to be unlawful assemblies having common object, it is not necessary to assign avert act to all member**

Court has no hesitation to come to a conclusion that the appellants were part of the unlawful assembly sharing the common object of killing, rioting and looting the villagers. Each one of the accused played an active role in

furtherance of the common object of the assembly and the Courts below were perfectly right in convicting the accused/appellants under Section 149, IPC.

Hence, in Court considered opinion, the prosecution has proved its case beyond reasonable doubt. In view of the settled principles of law, once it is established that the unlawful assembly had a common object, it is not necessary that all persons forming the unlawful assembly must be shown to have committed some overt act, rather they can be convicted under Section 149, IPC. **[Anup Lal Yadav vs. State of Bihar, 2014 (8) Supreme 78]**

**Section 302,307, 394 and 450- Sentence of death penalty – test the ‘rarest of rare category’ – age of accused, motive possibility of reform regarding accused must be kept in mind**

In this case whether death sentence awarded to the appellant is excessive, disproportionate on the facts and circumstance of the case, i.e., whether the present case can be termed to be a rarest of the rare case.

In the present case the appellant is an educated person, he was about 26 years old at the time of committing the offence. The accused was a tutor in the family of the deceased-Noorjahan. He was in acquaintance with the deceased as well as Zeenat Parveen (P.W. 3) and Razia Khatoon (P.W. 4). There is nothing specific to suggest the motive for committing the crime except the articles and case taken away by the accused. It is not the case of the prosecution that the appellant cannot be reformed or that the accused is a social menace. Apart from the incident in question there is no criminal antecedent of the appellant. It is true that the accused has committed a heinous crime, but it cannot be held with certainty that this case falls in the “rarest of the rare category”. On appreciation of evidence on record and keeping in mind the facts and circumstances of the case, we are of the view that sentence of death penalty would be extensive and unduly harsh.

Accordingly, we commute the death sentence of appellant to life imprisonment. The conviction and rest part of the sentence are affirmed. Appeals are partly allowed. **[Santosh Kumar Singh vs. State of MadhyaPradesh, 2014 (87) ACC 266 S.C.]**

**S. 304-B r/w Sec. 113b, Indian Evidence Act—Soon before death—Isolated instance of demand of dowry about four months prior to death cannot be said to constitute proximate live link to the death**

There is no evidence showing any persistent dowry demand or the conduct of the appellant subjecting Sharanjit Kaur to cruelty or harassment for or in connection with dowry. About twenty days prior to the occurrence, when

Sharanjit Kaur went to her father's house, she only generally stated about the dowry demand. She had not specifically stated about the demand of dowry by the appellant. In their evidence PWs 4 and 5 have stated that on 25.8.1997, they went to the house of Pritam Singh in village Burj Naklian, all the accused except appellant-Baljinder Kaur were in the house. After the alleged demand of gold karra two months after the marriage, Sharanjit Kaur went to her house, again came back to the marital house and again went to her father's house and again came back to the marital house. In Court considered view, the alleged demand of gold karra about two months after the marriage cannot be said to constitute a proximate live link with the death of deceased Sharanjit Kaur and the conviction of the appellant under Section 304B IPC cannot be sustained.

Even though there is no evidence that the deceased was treated with cruelty or harassment in connection with the demand of dowry 'soon before her death' by the appellant, in Court view, evidence on record makes out an offence under Section 498A IPC. So far as the sentence, the occurrence was of the year 1997. The appellant is having three grown up children. The appellant has already undergone sentence for a period of about fifteen months. In the facts and circumstances of the case, for the conviction under Section 498A, she is sentenced to undergo imprisonment already undergone. [**Baljinder Kaur vs. State of Punjab, 2014 (8) Supreme 97**]

**Sec. 376—In case of married woman in view of positive and substantive evidence of prosecutrix and other witnesses, inconclusive medical evidence cannot be ground for acquittal of accused**

So far as the Medical Report is concerned, Dr. (Smt.)Samdariya (PW-4), who has medically examined the prosecutrix has stated that she had observed a scratch mark on her forehead, that was 10 x ¼ c.m. in size and had further opined that since the prosecutrix was a married lady, no definite opinion regarding rape could be given. However, in Court opinion, the absence of a conclusive opinion of the medical examiner regarding rape in case of a married woman, cannot be a ground for acquittal of the accused, having regard to the positive and substantive evidence of the prosecutrix and the other prosecution witnesses. [**Mukesh vs. State of Chhattisgarh, 2014 (8) Supreme 104**]

**Sec. 409—Attractibility of—Removing public property from office premises to own house for personal use and not accounting for it clearly attracts offence u/s. 409 I.P.C.**

Court is of the view that the ingredients of the offence under Section 409 IPC are clearly attracted in the present case. As Managing Director of the Corporation, the appellant was having dominion over the property in question

in his capacity of public servant. The removal of timber from the plot in question to the house of the appellant at a considerable distance and non-accounting thereof in the books of the Corporation are very clinching and relevant circumstances. Court therefore upholds the order of conviction as recorded by the Courts below. [**Antony Cardoza vs. State of Kerala, 2014 (8) Supreme 165**]

## **Industrial Disputes Act**

**Ss. 2(00)and 25F – Compensation in lieu of reinstatement – Court may pass an order substituting an order of reinstatement by awarding – compensation but the same has to be based on justifiable ground**

It is no doubt true that a Court may pass an order substituting an order of reinstatement by awarding compensation but the same has to be based on justifiable grounds viz. (i) where the industry is closed; (ii) where the employee has superannuated or going to retire shortly and no period of service is left to his credit; (iii) where the workman has been rendered incapacitated to discharge the duties and cannot be reinstated and / or (iv) when he has lost confidence of the Management to discharge duties. What is sought to be emphasized is that there may be appropriate case on facts which may justify substituting the order of reinstatement by award of compensation, but that has to be supported by some legal and justifiable reasons indicating why the order of reinstatement should be allowed to be substituted by award of compensation.

In the instant matter, Court has not satisfied that the appellant's case falls in to any of the categories referred to herein before which would justify compensation in lieu of reinstatement. Court thus find no justification for the High Court so as to interfere with the Award passed by the Tribunal which was affirmed even by the Single Judge, but the Division Bench thought it appropriate to set aside the order of reinstatement without specifying any reasons whatsoever, as to why it substituted with compensation of a meager amount of Rs.20,000/- to the appellant.

In view of this court has set aside the judgment and order of the High Court and restore the Award of the Tribunal and the order of the Single Judge affirming the same. (**Tapash Kumar Paul v. BSNL, 2014 (6) SLR 538 (SC)**)

**Ss. 25F, 25-G and 25-N-Retrenchment – In absence of such ground taken in notice for retrenchment-Effect- It is always open to the workman to**

**allege violation of section 25-F of Industrial Disputes Act, 1947**

It is settled that Management can remove the workman on the ground of indiscipline or misconduct but in such the ground has to be mentioned in the notice and at least some evidence has to be cited in support of such allegation. In such a situation, the workman can understand the gravity of the charge and if required may deny the allegation or accept the same. In case a workman is removed on the ground of indiscipline or misconduct, the principle of “last come, first go” as envisaged under 25-G of the Industrial Disputes Act, 1947 is not attracted. However, in absence of such ground taken in the notice for retrenchment, it is always open to the workman to allege violation of section 25-F of the Industrial Disputes Act, 1947, if any junior is retained while challenging the order of retrenchment. **(Ram Narain Singh v. State of Punjab and others, (2014(143) FLR 924) Supreme Court)**

## **Interpretation of Statutes**

### **Purpose of interpretation – To understand and gather the mens or sentential legis or intention of the legislature**

The purpose of interpretation is to understand and gather the mens or sentential legis of the legislature as has been held in *Grasim Industries Ltd. vs. Collector of Customs, Bombay*, (2002)4 SCC 297. In the aforesaid authority, it has been held thus:

“The elementary principle of interpreting any word while considering a statute is to gather the mens or sentential legis of the legislature. Where the words are clear and there is no obscurity, and there is no ambiguity and the intention of the legislature is clearly conveyed, there is no scope for the court to take upon itself the task of amending or alternating (sic altering) the statutory provisions. Where the language is clear the intention of the legislature is to be gathered from the language used. While doing so, what has been said in the statute as also what has not been said has to be noted. The construction which requires for its support addition or substitution of words or which results in rejection of words has to be avoided. As stated by the Privy Council in *Crawford vs. Spooner*, (1846)6 Moore PC 1 “we cannot aid the legislature’s defective phrasing of an Act, we cannot add or mend and, by construction make up deficiencies which are left there”. In case of an ordinary word there should be no attempt to substitute or paraphrase of general application. Attention should be confined to what is necessary for deciding the particular case. This principle is too well settled and reference to a few decisions of this Court would suffice.” [M/s. Nova Ds vs. Metropolitan Transport Corporation and Ors., 2014(8) Supreme 481]

### **Land Acquisition Act**

**Section 4 and 6 of Land Acquisition Act, 1894 & Section 2 of the Forest Conservation Act, 1980– The order passed for resuming the land was held valid as the land has to be utilized by the competent authority in a transparent manner as per the policy and law applicable.**

**Article 14 read with Article 39(b) & (c) of the Constitution of India – Fair, transparent and non arbitrary exercise of power. The beneficiary of public land cannot be allowed to abuse its position to its advantage and to the disadvantage of the public.**

We have not been able to discern as to why forest land was acquired, if such land was already vested in the Government. There is nothing to show that the requisite permission was taken for converting forest land for non forest

purposes. In *B L Wadhera vs. Union of India*, (2002) 9 SCC 108, this Court considered the validity of gifting of the village common land for a hospital to Shri Chandra Shekhar, former Prime Minister. Quashing the said decision, this Court observed:

“Once the land was found to have been used for the purposes of forest, the provisions of the Indian Forest Act and the Forest Conservation Act would be attracted, putting restrictions on dereservation of the forest or use of the land for non-forest purposes. The Forest Conservation Act, 1980 has been enacted with the object of preventing deforestation. The provisions of the aforesaid Act are applicable to all forests. It is true that “forest” has not been defined under the Act but this Court in *T.N. Godavarman Thirumulkpad v. Union of India*, has held that the word “forest” must be understood according to its dictionary meaning. It would cover all statutorily recognized forest whether designated as reserved, protected or otherwise for the purposes of Section 2(i) of the Forest Conservation Act. The term “forest land” occurring in Section 2 will include not only the forest as understood in the dictionary sense but also any area regarded as forest in the government record irrespective of the ownership. The provisions of the Forest Conservation Act are applicable to all forests so understood irrespective of the ownership or classification thereof. This Court has issued certain directions and guidelines for the preservation of forest and its produce in *T.N. Godavarman* case which are not shown to have been implemented by the respondent State.

Section 2 of the Forest Conservation Act mandates that no State Government or authority shall make an order directing that any forest land or any portion thereof shall cease to be reserved or any forest land or any portion thereof may be used for non-forest purposes or forest land or any portion thereof may be assigned by way of lease or otherwise to any private person or to an authority, corporation, agency or any other organisation owned and controlled by the Government or any such land or portion thereof be cleared of trees which have grown therein — without the prior approval of the Central Government. The gifting of land, in the instant case, cannot, in any way, be termed to be for a forest purpose. Learned counsel appearing for the State of Haryana showed us a government order which had declared the area, covered by gift deeds, as forest prohibiting the cutting of the trees, declared as forest though for a limited period of 25 years. It is submitted that as the period of 25 years was not extended, the land, earlier declared as forest,

had ceased to be a forest land. Such a plea is contradictory in terms. The State of Haryana is proved to be conscious of the fact that the land, intended to be gifted, was either the forest land or property of the Forest Department regarding which condition 6 was imposed in its order granting the approval for gifting the land by the Gram Panchayat to the Trust. It is too late now in the day for the respondent State to urge that as notification declaring the land as forest was not extended after initial period of 25 years, the same be deemed to not be a forest land or land used for the purpose of the forest. In the affidavit filed on behalf of the respondents it is specifically stated:

“It is submitted that the State Government had only given approval to the Gram Panchayat for gifting the land. However, while permitting the Gram Panchayat to gift the land by way of abundant precaution, the State Government had imposed the condition to the effect that the land in question be got released from the Forest Department in accordance with law. The permission given by State Government did not mean at all that the donee or the donor was authorised in any way to divert the user of land in question.”

The contradictory pleas taken and stands adopted by the respondent State strengthens the argument of the petitioner that the transaction of making the gifts in favour of Respondent 7 is actuated by considerations other than those specified under the Act and the Rules made thereunder.

This Court cannot remain a silent spectator where people's property is being usurped for the personal leisure and pleasure of some individuals under the self created legal, protective umbrella and name of a trust. A politician of the stature of Shri Chandra Shekhar cannot claim to minimise the sufferings of the people by constituting the Trust and utilising the lands taken by it allegedly for the upliftment of the poor and the oppressed. The purpose of the respondent Trust may be laudable but under the cloak of those purposes the property of the people cannot be permitted to be utilised for the aforesaid objectives, particularly when the law mandates the utilisation of the transferred property in a specified manner and for the benefit of the inhabitants of the area, the poor and oppressed and the Scheduled Castes and Backward Classes. We are not impressed with any of the pleas raised on behalf of Respondent 7 that the land was acquired bona fide for the proclaimed object of upliftment of the people of this country in general and of the area in particular. We fail to understand as to how the country can be

uplifted by personal adventures of constituting trusts and acquiring hundreds of acres of lands for the purposes of that Trust. It is nothing except seeking personal glorification of the persons concerned.”

We cannot lose sight of above observations in view of the fact that we are dealing with the issue of allocation of public land to a private entity which requires fair, transparent and non arbitrary exercise of power in the light of mandate of Article 14 read with Articles 39 (b) and (c) of the Constitution. Once it is found that beneficiary of such allotment has abused its position to its advantage and to the disadvantage of the public, this Court cannot interfere with the fair order passed by a competent authority resuming the land.

Thus, the proposal put forward cannot be taken at its face value and cannot be the basis for interfering with the impugned orders. The land has to be utilised by the competent authority in a transparent manner as per applicable policy and law. [**Raunaq Education Foundation v. State of Haryana, 2014(32) LCD 2251 (SC)**]

**Ss. 4 and 6 – Acquisition of forest land for school – Forest land already vested in Govt. – Public land cannot be allowed to be used for private purchases.**

We cannot has not been able to discern as to why forest land was acquired, if such land was already vested in the Government. There is nothing to show that the requisite permission was taken for converting forest land for non forest purposes. In *B.L. Wadhwa vs. Union of India*, (2002)9 SCC 108, this Court considered the validity of gifting of the village common land for a hospital to Shri Chandra Shekhar, former Prime Minister. Quashing the said decision, this Court observed:

“41. Once the land was found to have been used for the purposes of forest, the provisions of the Indian Forest Act and the Forest Conservation Act would be attracted, putting restrictions on dereservation of the forest or use of the land for non-forest purposes. The Forest Conservation, 1980 has been enacted with the object of preventing deforestation. The provisions of the aforesaid Act are applicable to all forest. It is true that “forest” has not been defined under the Act but this Court in *T.N. Godavarman Thirumulkpad v. Union of India*, (2002)9 SCC 108 has held that the would “forest” must be understood according to its dictionary meaning. It would cover all statutorily recognised forest whether designated as reserved, protected or otherwise for the purposes of Section 2(i) of the Forest Conservation Act. The term “forest land” occurring in Section 2 will include not only the forest as understood in the dictionary sense but also any area regarded as forest in the government record irrespective of the ownership. The provisions of the Forest Conservation Act are applicable to all forests so understood irrespective of the ownership or classification thereof. This Court has issued certain directions and guidelines

for the preservation of forest and its produced in T.N. Godavarman case, (2002)9 SCC 108 which are not shown to have been implemented by the respondent State. ”

We cannot lose sight of above observations in view of the fact that we are dealing with the issue of allocation of public land to a private entity which requires fair, transparent and non arbitrary exercise of power in the light of mandate of Article 14 read with Articles 39(b) and (c) of the Constitution. Once it is found that beneficiary of such allotment has abuse its position to its advantage and to the disadvantage of the public, this Court cannot interfere with the fair order passed by a competent authority resuming the land. [**Raunaq Education Foundation vs. State of Haryana & Ors., 2014(8) Supreme 313**]

**Ss.23(1A), 28, Proviso—Additional compensation—Interest—Provisions of S.23(1A) are mandatory—Failure of High Court to notice those provisions and award 12% enhanced compensation for period commencing from date of publication of Notification u/s. 4—Reference Court awarded enhanced compensation but such amount was deposited in Court after date of expiry of period of one year—Failure of High Court also to award interest @ 15% p.a. as contemplated under proviso to S. 28—Order of High Court set aside .[**Jai Krishan vs. State of Uttarakhand, AIR 2014 SC 3578**]**

**S.151 – Application for restoration of possession has dismissed on ground of delay – valubility of Delay in filing the application for restoration of possession cannot be the reason for declining relief.**

Respondent-plaintiff filed a suit for eviction against the appellants-defendants. The eviction was sought for in respect of one room, one bath and privy on the first floor and one room on the ground floor in the western side and one shop room measuring 20’X12’ in the western side of premises.

During the trial the defendants filed an application under Section 151 C.P.C. on 4.1.2012, seeking restoration of possession of the suit property.

The trial court dismissed the petition.

The appellants filed revision before the High Court. The High Court dismissed the revision petition observing that the application filed under Section 151 C.P.C. is vague and that the appellants have approached the court belatedly. However, the High Court gave liberty to the appellants to take appropriate steps in accordance with law.

Admittedly, the suit was filed for ejectment indicating thereby that at the time of filing the suit in the year 2004, the defendants were in possession of the entire suit “B” schedule property. Application for restoration of possession

of the room on the first floor and the shop room on the ground floor was negative by the courts below merely on the ground of delay. Without going into the merits of rival contentions of both the parties in order to meet the ends of justice, in our view, possession of the first floor along-with stair case and the shop room on the ground floor should be restored to the appellants-defendants. Delay in filing the application for restoration of possession cannot be the reason for declining relief. [**Sushil Kumar Dey Biswas & Anr. vs. Anil Kumar Dey Biswas, 2014(8) Supreme 321**]

### **S.23 - Determination of market value and compunction u/s 23- Relevancy of comparative sale instances**

In determining compensation for acquired land, price paid in a bona fide transaction of sale transaction is adopted subject to such transaction being adjacent to acquired land, proximate to the date of acquisition and possessing similar advantages. Of course, there are other well-known methods of valuation like opinion of experts and yield method. In absence of any evidence of a similar transaction, it is permissible to take into account transaction of nearest land around the date of notification by making suitable allowance. There can be no fixed criteria as to what would be the suitable addition or subtraction from the value of the relied upon transaction.

The impugned judgment finding that in view of the situation of land under acquisition which was situated next to the municipal limits and very near to Golf Course and had potential for developing it into residential or commercial area, cut imposed to the extent of 20% was perfectly justified, calls for no interference. The extent of cut depends on individual fact situations. Moreover, sale instances Exts. P-21 and P-22 on which reliance was placed by the Single Judge was also justified since subject-matter of sale instances was situated within a distance of 20 killas or less from the land under acquisition. [**Union of India vs. Raj Kimar Bghal Singh, (2014) 10 SCC 422**]

### **Land Laws**

#### **Mutation entries do not confer title – khasra entries relevant only for purposes of paying land revenue. Have nothing to do with ownership**

Mutation entries do not confer title. In Smt. Sawarni v. Smt. Inder Kaur & others, 1996 (6) SCC 223, this Court held : "Mutation of a property in the revenue record does not create or extinguish title nor has it any presumptive value on title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question. The learned Additional District Judge was wholly in error in coming to a conclusion that mutation in favour of Inder Kaur

conveys title in her favour. This erroneous conclusion has vitiated the entire judgment....."

The High Court committed a grave and manifest error of law in reversing the well reasoned judgment and decree passed by the Trial Court by simply placing reliance upon Khasaras entries even without properly appreciating the settled law that Khasara entries do not convey title of the suit property as the same is only relevant for the purposes of paying land revenue and it has nothing to do with ownership. (**Municipal Corporation, Gwalior v. Puran Singh alias Puran Chand, 2014 (6) Supreme 671**)

## **Limitation Act**

### **Section 5 of Limitation Act, 1963 – Delay condonation (Delay of 10 years 2 months and 29 days)**

The courts should not adopt an injustice-oriented approach in rejecting the application for condonation of delay. However the court while allowing such application has to draw a distinction between delay and inordinate delay for want of bona fides of an inaction or negligence would deprive a party of the protection of Section 5 of the Limitation Act, 1963. Sufficient cause is a condition precedent for exercise of discretion by the Court for condoning the delay. This Court has time and again held that when mandatory provision is not complied with and that delay is not properly, satisfactorily and convincingly explained, the court cannot condone the delay on sympathetic grounds alone.

It is also a well settled principle of law that if some person has taken a relief approaching the Court just or immediately after the cause of action had arisen, other persons cannot take benefit thereof approaching the court at a belated stage for the reason that they cannot be permitted to take the impetus of the order passed at the behest of some diligent person.

*In State of Karnataka & ors. v. S.M. Kotrayya & ors., (1996) 6 SCC 267,* this Court rejected the contention that a petition should be considered ignoring the delay and laches on the ground that he filed the petition just after coming to know of the relief granted by the Court in a similar case as the same cannot furnish a proper explanation for delay and laches. The Court observed that such a plea is wholly unjustified and cannot furnish any ground for ignoring delay and laches.

Same view has been reiterated by this Court in *Jagdish Lal & Ors. v. State of Haryana & Ors., AIR 1997 SC 2366*, observing as under:-

“Suffice it to state that appellants kept sleeping over their rights for long and elected to wake-up when they had the impetus from Vir Pal Chauhan and Ajit Singh’s ratios..... Therefore desperate attempts of the appellants to re-do the seniority, held by them in various cadre.... are

not amenable to the judicial review at this belated stage. The High Court, therefore, has rightly dismissed the writ petition on the ground of delay as well.”

In *M/s. Rup Diamonds & Ors. v. Union of India & Ors.*, AIR 1989 SC 674, this Court considered a case where petitioner wanted to get the relief on the basis of the judgment of this Court wherein a particular law had been declared ultra vires. The Court rejected the petition on the ground of delay and laches observing as under:-

“There is one more ground which basically sets the present case apart. Petitioners are re-agitating claims which they have not pursued for several years. Petitioners were not vigilant but were content to be dormant and chose to sit on the fence till somebody else’s case came to be decided.”

In the instant case, after considering the facts and circumstances and the reasons for inordinate delay of 10 years 2 months and 29 days, the High Court did not find sufficient grounds to condone the delay.

In view of the facts of the case and the above-cited judgments, we do not find any fault with the impugned judgment. The petitions lack merit and are accordingly dismissed. [**Brijesh Kumar v. State of Haryana, 2014(3) ARC 761 (SC)**]

### **M.P. Ceiling on Agricultural Land Holdings Act**

**Ss. 35, 36**—M.P. Land Revenue Code, Ss. 158, 250—Allotment of surplus land—Bhumiswami rights—Surplus land allotted giving bhumiswami right to appellants—Respondents subsequently purchasing it by sale deed without consideration—Sale deed allegedly executed by the appellants in favour of respondent is null and void—Same does not confer any right, title or interest in favour of respondent.

In the instant case the land, which was declared surplus land, was allotted by the State in purported exercise of power u/s. 35 of the said Act giving Bhumiswami right to the appellants. The said allotment was made in the year 1973. Within two years from the date of the said allotment, the land was purchased by the respondent by sale deed dated 4.7.1975, which, according to the appellants, was without consideration and the respondent in connivance with the other persons managed to keep the appellants out of possession. Prima facie, therefore, the sale deed alleged to have been executed by the appellants in favour of the respondent on 4.7.1975 is null and void and the same does not confer any right, title or interest in favour of the respondent-Sattar Khan.

**[Tolya vs. State of M.P., AIR 2014 SC 3474]**

## **M.P. Madhyasthan Adhikari Adhiniyam**

**S.19—Revision—Delay in filing—Condonation of—Provisions of S.5 of Limitation Act is applicable—Hence, delay in filing revision petitions is condoned and cases remanded to High Court to examine same on merits.**

**Nagar Palika Parishad, Morena vs. Agrawal Construction Company, (2004) 2 MPJR 374, Overruled.**

Section 19 of the Act of 1983, does not contain any express rider on the power of the High Court to entertain an application for revision after the expiry of the prescribed period of three months. On the contrary, the High Court is conferred with suo motu power, to call for the record of an award at any time. It cannot, therefore, be said that the legislative intent was to exclude the applicability of Section 5 of the Limitation Act to Section 19 of the Act of 1983. Section 5 of the Limitation Act is applicable to Section 19 of the Act of 1983. No express exclusion has been incorporated therein, and there is neither any evidence to suggest that the legislative intent was to bar the application of Section 5 of the Limitation Act on Section 19 of the Act of 1983. Hence, the delay in filing revision petitions is condoned and the cases are remanded to the High Court to examine the same on merits. [**State of M.P. vs. Anshuman Shukla, AIR 2014 SC 3403**]

## **Mines Act**

**S. 2(c)—Agent—Who is—Administrative head—Not dealing with technical matters nor authorized by mine owner—Would not be treated as agent—Only because he is working as Chief General Manager**

It is true that "Agent" has an extended meaning in the Act. It not only brings within its fold a person who is appointed as an Agent in relation to a mine but also brings within its fold a person not appointed as an Agent but who acts or purports to act on behalf of the owner of the mine and takes part in the management, control, supervision or direction of the mine or any part thereof.

It is nobody's case that G.N. Verma was appointed as an Agent of any mine. Also, the complaint does not allege or state anywhere that G.N. Verma acted or purported to act on behalf of the owner of the mine or that he took part in the management, control, supervision or direction of any mine. In fact his duties and responsibilities have not been described in the complaint.

The criminal complaint does not contain any allegation against G.N. Verma. The only statement concerning him is that he was the Chief General Manager/deemed Agent of the mine and was exercising supervision,

management and control of the mine and in that capacity was bound to see that all mining operations were conducted in accordance with the Act, the rules, regulations, orders made thereunder. In the face of such a general statement, which does not contain any allegation, specific or otherwise, it is difficult to hold that the Chief Judicial Magistrate rightly took cognizance of the complaint and issued summons to G.N. Verma. The law laid down by this Court in National Small Industries Corporation Ltd. vs. Harmeet Singh Paintal, (2010) 3 SCC 330: AIR 2010 SC (Supp) 569: 2010 AIR SCW 1508 (though in another context) would be squarely applicable. Under the circumstances, we are of the opinion that on the facts of this case and given the absence of any allegation in the complaint filed against him no case for proceeding against G.N. Verma has been made out.

Regulation 8-A of the Coal Mines Regulations requires the owner of a mine to submit in writing a statement showing the name and designation of every person authorised to act on behalf of the owner in respect of the management, control, supervision or direction of a mine. There is nothing on record to show that any such statement was furnished by the owner of the mine to the Chief Inspector or the Regional Inspector appointed under the Act. Only a person who is authorised to act on behalf of the owner or purports to act on behalf of the owner may be deemed to be an Agent. In the absence of any statement having been made or any indication having been given by the owner enabling G.N. Verma to act or purport to act on his behalf, it cannot be said that he was a deemed Agent for the mine. [**G.N. Verma vs. State of Jharkhand, AIR 2014 SC 3549**]

## **Motor Vehicles Act**

**S.2(30) – Vehicle under hypothecation – Finance even through registered as owner, does not become in control and possession of the vehicle – Borrower if in control and possession and driving without statutory issuance will be liable not financier.**

In Purnya Kala Devi, a three-Judge Bench has categorically held that the person in control and possession of the vehicle under an agreement of hypothecation should be construed as the owner and not alone the registered owner and thereafter the Court has adverted to the legislative intention, and ruled that the registered owner of the vehicle should not be held liable if the vehicle is not in his possession and control. There is reference to Section 146 of the Act that no person shall use or cause or allow any other person to use a motor vehicle in a public place without insurance as that is the mandatory statutory requirement under the 1988 Act. In the instant case, the predecessor-

in-interest of the appellant, Centurion Bank, was the registered owner along with respondent no.2. The respondent no. 2 was in control and possession of the vehicle. He had taken the vehicle from the dealer without paying the full premium to the insurance company and thereby getting the vehicle insured. The High Court has erroneously opined that the financier had the responsibility to get the vehicle insured, if the borrower failed to insure it. The said term in the hypothecation agreement does not convey that the appellant financier had become the owner and was in control and possession of the vehicle. It was the absolute fault of the respondent no.2 to take the vehicle from the dealer without full payment of the insurance. Nothing has been brought on record that this fact was known to the appellant financier or it was done in collusion with the financier. When the intention of the legislature is quite clear to the effect, a registered owner of the vehicle should not be held liable if the vehicle is not in his possession and control and there is evidence on record that the respondent no.2, without the insurance plied the vehicle in violation of the statutory provision contained in Section 146 of the 1988 Act, the High Court could not have mulcted the liability on the financier. The appreciation by the learned Single Judge in appeal, both in fact and law, is wholly unsustainable. [**HDFC Band Ltd. vs. Kumari Reshma and Otrs., 2014(8) Supreme 359**]

**S.149—Accident compensation—Liability of Insurance Company—Driver not possessing valid licence—Accident vehicle also used after expiry of temporary registration—Insurance company is not liable for compensation.**

Indisputably, a temporary registration was granted in respect of the vehicle in question, which had expired on 11.1.2006 and the alleged accident took place on 2.2.2006 when the vehicle was without any registration. Nothing has been brought on record by the appellant to show that before or after 11.1.2006, when the period of temporary registration expired, the appellant, owner of the vehicle either applied for permanent registration as contemplated under Section 39 of the Act or made any application for extension of period as temporary registration on the ground of some special reasons. In our view, therefore, using a vehicle on the public road without any registration is not only an offence punishable under Section 192 of the Motor Vehicles Act but also a fundamental breach of the terms and conditions of policy contract. [**Narinder Singh vs. New India Assurance Company Ltd., AIR 2014 SC 3761**]

**S. 149 - Contributory negligence**-Corporation bus took a right turn to enter bus depot without giving indication and a motorcyclist following the bus collided with it and sustained fatal injuries- Bus driver should have taken extra

care and caution while taking a right turn as he was driving a heavy passenger vehicle- Evidence produced by claimants shows that accident was caused on account of negligence of bus driver in not giving indicator and no evidence adduced by Corporation that Motorcyclist contributed to the accident- Tribunal found and the High Court affirmed that both the drivers were responsible for the accident and respective blame being 75.25 for bus driver and motorcyclist- Apex Court set aside this finding and held that bus driver was solely responsible for the accident and there was no contributory negligence of the deceased. [**Yerramma and others vs. G. Krishnamurthy and another, 2014 ACJ 2161(S.C.)**]

**Fatal accident-** Deceased aged 53, ASI in Police Department, drawing Rs. 26,000/- p.m.- Claimants: widow, 3 minor children and mother- Claims Tribunal taking net income of the deceased at Rs. 21,168/- p.m. and deducting 25 per cent towards contributory negligence awarded Rs. 15,97,974- High Court enhanced the award to Rs. 16,05,474- Apex Court set aside finding of contributory negligence and taking gross salary at Rs. 26,000 p.m., deducted 10 per cent for income tax, 1/4th for personal expenses of the deceased, adopted multiplier of 11 and allowed Rs. 23,16,600 plus Rs. 1,00,000 each for loss of consortium, loss of love and affection and loss to estate and Rs. 10,000 for funeral expenses- Award of Rs, 16,05,474 enhanced to Rs. 26,26,600. [**Yerramma and others vs. G. Krishnamurthy and another, 2014 ACJ 2161(S.C.)**]

**Negligence-** Contributory negligence. Hitting from behind. Truck hit a two-wheeler from behind, dragged it to a distance of 20-25 ft and rider of two-wheeler sustained fatal injuries. Impact on two-wheeler shows that truck must have been travelling at a high speed and its driver did not have sufficient control over his vehicle. Truck driver was driving a heavy motor vehicle and should have taken sufficient caution. No Direct evidence showing negligence of the deceased that led to the accident. Tribunal found that two-wheeler rider contributed to the accident to the extent of 20 per cent and it was affirmed by High Court. Apex Court set aside the finding of contributory negligence and held that truck driver was solely responsible for the accident. [2013 ACJ 2141 (SC) followed.] [**Ashvinbhai Jayantilal Modi vs. Ramkaran Ramchandra Sharma, 2014 ACJ 2648. (SC)**]

## **Muslim Law**

**Gift**—Immovable property gifted in favour of donee-wife contemplating transfer of corpus and not usufruct—Conditions curtailing its use or disposal are to be treated as void—Gift deed irrevocably vested all rights in immovable

property in donee—Sale of gifted immovable property by donee is therefore, legal and valid—Consequently, claim of respondents LRs of donor to gifted property on demise of donee—Is illegal. [V. Sreeramachandra Avadhani (D) by L.Rs. vs. Shaik Abdul Rahim, AIR 2014 SC 3464]

**Oral Gift – Transfer of Property Act, 1882, Sections 123, 129 – It was held that a muslim may make an oral gift provided that possession follows. Deed of gift is admissible to prove that a gift was made.**

In *Karam Ilahi v. Sharfuddin*, AIR 1961 All 351 it has been held as follows:-

“It is admitted that a Muhammadan may make an oral gift provided that possession follows. It seems to us quite clear that the provisions of Section 123 are inapplicable to gifts made by Muhammadans and valid according to their law. It is quite clear that the Legislature had in its mind the provisions of Section 123 when enacting Section 129. Section 123 is specifically referred to in Section 129. The deed of gift is admissible to prove that a gift was made.”

In *Nasib Ali, Wajid Ali*, AIR 1927 Cal 197 Suhrawardy, J. referred to *Kamarunnissa Bibi v. Hussaini Bibi*, (1880) 3 All 266 and *Karam Ilahi* (*supra*) and came to hold that the essentials of a gift under the Mohammadan Law are a declaration of ‘hiba’ by the donor, an acceptance, express or implied, of the gift by the donee, and delivery of possession of the property, the subject-matter of the gift, according to its nature. A simple gift can only be made by going through the above formalities and no written instrument is required. In fact no writing is necessary to validate a gift and if a gift is made by a written instrument without delivery of possession, it is invalid, in law. Thereafter, the learned judge stated thus:-

“The position under the Mohammadan Law is this: that a gift in order to be valid must be made in accordance with the forms stated above; and even if it is evidenced by writing, unless all the essential forms are observed, it is not valid according to law. That being so, a deed of gift executed by a Mohammadan is not the instrument effecting, creating or making the gift but a mere piece of evidence. It may so happen after a lapse of time that the evidence of the observance of the above forms might not be forthcoming, so it is sometimes thought prudent to reduce the fact that a gift has been made into writing. Such writing is not a document of title but is a piece of evidence.”

From the aforesaid it is vivid that the possession can be shown not only by enjoyment of the land or premises in question but also by asserting who

has the actual control over the property. Someone may be in apparent occupation of the premises, but the other would have control and gaining advantage of possession. In the case at hand plea of actual physical possession by Rasheeda Khatoon does not deserve acceptance. The existence of any overt act to show control requires to be scrutinised. A plea was advanced by the plaintiff that she had been collecting rent from the tenants inducted by the donor, but no rent receipts have been filed. On the contrary certain rent receipts issued by the donor after the execution of the deed of gift have been brought on record. There is no proof that the land was mutated in her favour by the revenue authorities. She was also not in possession of the title deeds. Thus, the evidence on record, on a studied scrutiny, clearly reveal that Rasheeda Khatoon was not in constructive possession. Therefore, one of the elements of the valid gift has not been satisfied. That being the position there is no necessity to advert to the aspect whether the instrument in question required registration or not because there can be certain circumstances a deed in writing may require registration. In the case at hand, we conclusively hold that as the plaintiff could not prove either actual or constructive possession, the gift was not complete and hence, the issue of registration does not arise.

In view of the aforesaid premises, we, though for different reasons, affirm the judgment and decree of the High Court and dismiss the appeal as a consequence of which the suit of the plaintiff stands dismissed. There shall be no order as to costs. [**Rasheeda Khatoon (Dead) v. Ashiq Ali, 2014(32) LCD 2188 (SC)**]

### **Narcotic Drugs and Psychotropic Substances Act**

**S. 8(c), Sch. 1—Narcotic Drugs and Psychotropic Substances Act, 1985, Rr. 53, 64, 65, Sch 1—Prohibition of certain operations—“Dealing in any manner in any narcotic drug or psychotropic substance”—Prohibited u/s. 8(c)—Said prohibition contained u/s. 8 attracted in respect of psychotropic substances which find mention in schedule to Act—Not restricted to those mentioned in Sch. 1 to Rules.**

***State of Uttaranchal vs. Rajesh Kumar Gupta, 2006 AIR SCW 5666, Overruled.***

On the above analysis of the provisions of chapters VI and VII of the 1985 Rules, we are of the opinion, both these Chapters contain Rules permitting and regulating the import and export of narcotic drugs and psychotropic substances other than those specified in the Schedule-I to the 1985 Rules subject to various conditions and procedure stipulated in Chapter VI. Whereas Chapter VII deals exclusively with various other aspects of

DEALING IN psychotropic substances and the conditions subject to which such DEALING IN is permitted. We are of the opinion that both Rules 53 and 64 are really in the nature of exception to the general scheme of Chapters VI and VII respectively containing a list of narcotic drugs and psychotropic substances which cannot be dealt in any manner notwithstanding the other provisions of these two chapters. We are of the clear opinion that neither Rule 53 nor Rule 64 is a source of authority for prohibiting the DEALING IN narcotic drugs and psychotropic substances, the source is Section 8. Rajesh Kumar Gupta's case (2006 AIR SCW 5666) in our view is wrongly decided.

In view of our conclusion, the complete analysis of the implications of Section 8015 of the Act is not really called for in the instant case. It is only required to be stated that essentially the Drugs & Cosmetics Act, 1940 deals with various operations of manufacture, sale, purchase etc. of drugs generally whereas Narcotic Drugs and Psychotropic Substances Act, 1985 deals with a more specific class of drugs and, therefore, a special law on the subject. Further the provisions of the Act operate in addition to the provisions of 1940 Act. (**Union of India & Another vs. Sanjeev V. Deshpande, AIR 2014 SC 3625**)

### **Negotiable Instruments Act**

**S. 138 – Criminal P.C., S. 177—Dishonour of cheque—Complaint—Territorial jurisdiction—Return of cheque by drawee bank—Alone constitutes commission of offence – Situs or venue of trial thus restricted to place where drawee bank is located – Place of issuance or delivery of statutory notice or where complainant present cheque for encashment – Not relevant for purpose of territorial jurisdiction of complaints**

The earliest and the most often quoted decision of this Court relevant to the present conundrum is *K. Bhaskaran v. Sankaran Vaidhyan Balan, AIR 1999 SC 3762* wherein a two-Judge Bench has, inter alia, interpreted Section 138 of the NI Act to indicate that, “the offence under Section 138 can be completed only with the concatenation of a number of acts. Following are the acts which are components of the said offence: (1) Drawing of the cheque, (2) Presentation of the cheque to the bank, (3) Returning the cheque unpaid by the drawee bank, (4) Giving notice in writing to the drawer of the cheque demanding payment of the cheque amount, (5) Failure of the drawer to make payment within 15 days of the receipt of the notice.” The provisions of Sections 177 to 179 of the Code of Criminal Procedure, 1973 (for short, ‘CrPC’) have also been dealt with in detail.

..... Bhaskaran's case was heard by a two-judge Bench of this Court who took the view that the jurisdiction to try an offence under Section 138 could not be determined only by reference to the place where the cheque was dishonoured. That is because dishonour of the cheque was not by itself an

offence under Section 138 of The Negotiable Instruments Act, 1881, observed the Court. The offence is complete only when the drawer fails to pay the cheque amount within the period of fifteen days stipulated under clause (c) of the proviso to Section 138 of the Act. Having said that the Court recognised the difficulty in fixing a place where such failure could be said to have taken place. It could, said the Court, be the place where the drawer resides or the place where the payee resides or the place where either of them carries on business. To resolve this uncertainty the Court turned to Sections 178 and 179 of the Cr.P.C. to hold that since an offence under Section 138 can be completed only with the concatenation of five acts that constituted the components of the offence any Court within whose jurisdiction any one of those acts was committed would have the jurisdiction to try the offence. [**Dashrath Rupsingh Rathod vs. State of Maharashtra & Another, AIR 2014 SC 3519:2014(5) Supreme 641**]

**Ss. 138, 142**—Dishonour of cheque—Complaint—Limitation—Payee, complainant issued handwritten notice to drawer and also sent subsequent legal notice—Mentioned only legal notice in complaint—Basing on said averment Trial Court found that complaint was within period of limitation—Before High Court in proceedings for quashing complaint, plea of limitation raised for first time—Non-consideration of issue of limitation on merits by High Court—Not proper—In peculiar facts, matter remitted to trial court permitting complainant to file application for condonation of delay. [**Pawan Kumar Ralli vs. Maninder Singh Narula, AIR 2014 SC 3512**]

**S. 138**—Dishonour of cheque—Complaint—It is not necessary to aver in complaint that notice was served upon accused—Order of High Court quashing complaint on ground that there was no proof either that notice was served or it was returned unserved—Is erroneous and set aside

The complaint was filed alleging that the cheque issued by the respondent-accused for repayment of a legally recoverable debt bounced. On 17/6/2011 learned Magistrate issued process. The respondent-accused filed a criminal revision application before the Additional Sessions Judge, Aurangabad mainly on the assertion that the demand notice was not served on him. The said criminal revision application was rejected. Being aggrieved by the said order, the respondent-accused filed criminal writ petition in the High Court under Section 482 of the Code of Criminal Procedure, 1973 ('the Cr.P.C.'). The High Court quashed the complaint on a short ground that on reading verification of the complaint dated 17/6/2011, it is explicit that there are no recitals to demonstrate that the notice issued under Section 138 of the NI Act by the complainant was served upon the respondent-accused on any specific date. The High Court observed that there is no proof that either the notice was served or it

was returned unserved/unclaimed and that that there is no averment in the complaint about the same. The High Court concluded that, therefore, there could not be a cause of action to prosecute the accused under Section 138 of the NI Act. For coming to this conclusion, the High Court relied on the order of this Court in *Shakti Travel & Tours v. State of Bihar & Anr*, (2002) 9 SCC 415.

Applying the above conclusions to the facts of this case, it must be held that the High Court clearly erred in quashing the complaint on the ground that there was no recital in the complaint that the notice under Section 138 of the NI Act was served upon the accused. The High Court also erred in quashing the complaint on the ground that there was no proof either that the notice was served or it was returned unserved/unclaimed. That is a matter of evidence. We must mention that in *C.C. Alavi Haji (AIR 2007 SC (Supp) 1705)*, this Court did not deviate from the view taken in *Vinod Shivappa (AIR 2006 SC 2179)*, but reiterated the view expressed therein with certain clarification. We have already quoted the relevant paragraphs from *Vinod Shivappa* where this Court has held that service of notice is a matter of evidence and proof and it would be premature at the stage of issuance of process to move the High Court for quashing of the proceeding under Section 482 of the Cr.P.C. These observations are squarely attracted to the present case. The High Court's reliance on an order passed by a two-Judge Bench in *Shakti Travel & Tours (2001 AIR SCW 2307)* is misplaced. The order in *Shakti Travel & Tours* does not give any idea about the factual matrix of that case. It does not advert to rival submissions. It cannot be said therefore that it lays down any law. In any case in *C.C. Alavi Haji*, to which we have made a reference, the three-Judge Bench has conclusively decided the issue. In our opinion, the judgment of the two-Judge Bench in *Shakti Travel & Tours* does not hold the field any more. [M/s. Ajeet Seeds Ltd. Vs. K. Gopala Krishnaiah, AIR 2014 SC 3057]

**S. 138—Dishonour of cheque—Territorial jurisdiction—Issue of statutory notice from place 'G'—Cannot by itself confer jurisdiction upon Court at place 'G' to take cognizance of an offence under S. 138—Complaint transferred to Court at place where cheque was drawn**

A cheque allegedly issued in partial repayment of the loan amount and drawn on the Syndicate Bank, City Market Branch, Bangalore, when presented for encashment to ING Vysya Bank, Gurgaon appears to have been dishonoured resulting in the issue of statutory notices to the petitioners and eventual filing of a complaint before the Judicial Magistrate, First Class at Gurgaon under Section 138 of The Negotiable Instruments Act, 1881.

The only reason the complainant claims jurisdiction for the Courts at Gurgaon is the fact that the complainant-respondent had issued the statutory

notices relating to the dishonour of the cheque from Gurgaon. We do not think that issue of a statutory notice can by itself confer jurisdiction upon the Court to take cognizance of an offence under Section 138 of The Negotiable Instruments Act. We say so because in *Harman Electronics (P) Ltd. v. National Panasonic India (P) Ltd. (2009) 1 SCC 720* this Court examined a similar question and clearly ruled that a unilateral act on the part of the complainant of issuing a notice from any part of the country would not vest the Court from within whose territorial limits the notice has been issued with the power to entertain a complaint. That judgment has been affirmed by a three-judge bench of this Court in *Dashrath Rupsingh Rathod v. State of Maharashtra & Anr. Criminal Appeal No.2287 of 2009* delivered on 1st August, 2014. This Court has in that case held that presentation of the cheque at a place of the choice of the complainant or issue of a notice from any such place do not constitute ingredients of the offence under Section 138 and cannot, therefore, confer jurisdiction upon the Court from where such acts are performed. [Sree Mahesh Stationaries vs. Indiabulls Financial Services Ltd., 2014 Cri.L.J. 4853 (SC)]

**S. 138- Territorial jurisdiction for filing cheque dishonor complaint under-Applying Dashrath, (2014) 9 SCC 129, held, place of issuance of statutory notice or place of deposit of cheque in a bank by payee or place of receipt of notice by accused, demanding, payment, would not confer jurisdiction upon courts of that place- What is import is whether drawee bank which dishonored the cheque, is situate within jurisdiction of court taking cognizance.**

The legal position on the subject was summed up in the following words: (Dashrath Rupsingh Rathod case, SCC pp. 137-74, para 58)

“58.To sum up:

58.1 (i) An offence under Section 138 of the Negotiable Instruments Act, 1881 is committed no sooner a cheque drawn by the accused on an account being maintained by him in a bank for discharge of debt/liability is returned unpaid for insufficiency of funds or for the reason that the amount exceeds the arrangement made with the bank.

58.2 (ii) Cognizance of any such offence is however forbidden under Section 142 of the Act except upon a complaint in writing made by the payee or holder of the cheque in due course within a period of one month from the date the cause of action accrues to such payee or holder under clause (c) of proviso to Section 138.

58.3 (iii) The cause of action to file a complaint accrues to a complainant/payee/holder of a cheque in due course if

(a) the dishonoured cheque is presented to the drawee bank within a period of six months from the date of its issue.

(b) If the complainant has demanded payment of cheque amount within thirty days of receipt of information by him from the bank regarding the dishonour of the cheque and

(c) If the drawer has failed to pay the cheque amount within fifteen days of receipt of such notice.

58.4 (iv) The facts constituting cause of action do not constitute the ingredients of the offence under Section 138 of the Act.

58.5 (v) The proviso to Section 138 simply postpones/defers institution of criminal proceedings and taking of cognizance by the Court till such time cause of action in terms of clause (c) of proviso accrues to the complainant.

58.6 (vi) Once the cause of action accrues to the complainant, the jurisdiction of the Court to try the case will be determined by reference to the place where the cheque is dishonoured.

58.7 (vii) The general rule stipulated under Section 177 of Cr.P.C applies to cases under Section 138 of the Negotiable Instruments Act. Prosecution in such cases can, therefore, be launched against the drawer of the cheque only before the Court within whose jurisdiction the dishonour takes place except in situations where the offence of dishonour of the cheque punishable under Section 138 is committed along with other offences in a single transaction within the meaning of Section 220(1) read with Section 184 of the Code of Criminal Procedure or is covered by the provisions of Section 182(1) read with Sections 184 and 220 thereof.”

In the light of the above pronouncement of this Court we have no hesitation in holding that the issue of a notice from Delhi or deposit of the cheque in a Delhi bank by the payee or receipt of the notice by the accused demanding payment in Delhi would not confer jurisdiction upon the Courts in Delhi. What is important is whether the drawee bank who dishonoured the cheque is situate within the jurisdiction of the Court taking cognizance. In that view, we see no reason to interfere with the order passed by the High Court which simply requires the Magistrate to examine and return the complaints if they do not have the jurisdiction to entertain the same in the light of the legal position as stated in Harman’s case (supra). All that we need to add is that while examining the question of jurisdiction the Metropolitan Magistrates

concerned to whom the High Court has issued directions shall also keep in view the decision of this Court in Dashrath's case, (2014)9 SCC 12. [**Vinay Kumar Shailendra vs. Delhi High Court Legal Services Committee, (2014) 10 SCC 708**]

**Ss. 138 proviso (c) and 141- dishonor of Cheque- Complaint being non est (see Short note A) having been filed before expiry of 15 day period prescribed in S. 138 proviso (c) – Re-presentation/Re-filing of complaint- Held, Complainant is not permitted to present the very same said non est complaint at any later stage.**

Commission of an offence is a sine qua non for filing a complaint and for taking cognizance of such offence. A bare reading of the provision contained in clause (c) of the proviso makes it clear that no complaint can be filed for an offence under Section 138 of the NI Act unless the period of 15 days has elapsed. Any complaint before the expiry of 15 days from the date on which the notice has been served on the drawer/accused is no complaint at all in the eye of law. It is not the question of prematurity of the complaint where it is filed before expiry of 15 days from the date on which notice has been served on him, it is no complaint at all under law. As a matter of fact, Section 142 of the NI Act, inter alia, creates a legal bar on the Court from taking cognizance of an offence under Section 138 except upon a written complaint. Since a complaint filed under Section 138 of the NI Act before the expiry of 15 days from the date on which the notice has been served on the drawer/accused is no complaint in the eye of law, obviously, no cognizance of an offence can be taken on the basis of such complaint. Merely because at the time of taking cognizance by the Court, the period of 15 days has expired from the date on which notice has been served on the drawer/accused, the Court is not clothed with the jurisdiction to take cognizance of an offence under Section 138 on a complaint filed before the expiry of 15 days from the date of receipt of notice by the drawer of the cheque. [**Yogendra Pratap Singh vs. Savitri Pandey, (2014) 10 SCC 713**]

### **Jurisdiction of Court in Trial u/s 138 N.I. Act**

Section 138 of the NI Act is structured in two parts- the primary and the provisory. It must be kept in mind that the Legislature does not ordain with one hand and immediately negate it with the other. The proviso often carves out a minor detraction or diminution of the main provision of which it is an appendix or addendum or auxiliary. Black Law Dictionary states in the context of a proviso that it is – “a limitation or exception to a grant made or authority conferred, the effect of which is to declare that the one shall not operate, or the

other be exercised, unless in the case provided. .... A clause or part of a clause in a statute, the office of which is either to except something from the enacting clause, or to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of its extent.” It should also be kept in perspective that a proviso or a condition are synonymous. In our perception in the case in hand the contents of the proviso place conditions on the operation of the main provision, while it does form a constituent of the crime itself, it modulates or regulates the crime in circumstances where, unless its provisions are complied with, the already committed crime remains impervious to prosecution. The proviso to Section 138 of the NI Act features three factors which are additionally required for prosecution to be successful. In this aspect Section 142 correctly employs the term “cause of action” as compliance with the three factors contained in the proviso are essential for the cognizance of the offence, even though they are not part of the action constituting the crime. To this extent we respectfully concur with K. Bhaskaran, (1999) 7 SCC 510 in that the concatenation of all these concomitants, constituents or ingredients of Section 138 and its proviso, is essential for the successful initiation or launch of the prosecution. However, so far as the offence itself is concerned Section 138 proviso has no role to play. According a reading of Section 138 of NI Act in conjunction with Section 177, CrPC leaves no manner of doubt that the return of the cheque by the drawee bank alone constitutes the commission of the offence and indicates the place where the offence is committed.

The place, situs or venue of judicial inquiry and trial of the offence must logically be restricted to where the drawee bank, is located. The law should not be warped for commercial exigencies. As it is Section 138 of the NI Act has introduced a deeming fiction of culpability, even though, Section 420 IPC is still available in case the payee finds it advantageous or convenient to proceed under that provision. An interpretation should not be imparted to Section 138 which will render it as a device of harassment i.e. by sending notices from a place which has no casual connection with the transaction itself, and/or by presenting the cheque(s) at any of the banks where the payee may have an account. In our discernment, it is also now manifest that traders and businessmen have become reckless and incautious in extending credit where they would heretofore have been extremely hesitant, solely because of the availability of redress by way of criminal proceedings. It is always open to the creditor to insist that the cheques in question be made payable at a place of the creditor’s convenience. Today’s reality is that the every Magistracy is inundated with prosecutions under Section 138 NI Act, so much so that the burden is becoming unbearable and detrimental to the disposal of other equally pressing litigation. We think that Courts are not required to twist the law to give

relief to incautious or impetuous persons; beyond Section 138 of the NI Act. And of course, he can always file a civil suit for recovery wherever the cause of action arises in civil law.

The relief introduced by Section 138 of the NI Act is in addition to the contemplations in the IPC. It is still open to such a payee recipient of a dishonoured cheque to lodge a First Information Report with the Police or file a Complaint directly before the concerned Magistrate. If the payee succeeds in establishing that the inducement for accepting a cheque which subsequently bounced had occurred where he resides or ordinarily transacts business, he will not have to suffer the travails of journeying to the place where the cheque has been dishonoured. All remedies under the IPC and CrPC are available to such a payee if he chooses to pursue this course of action, rather than a Complaint under Section 138 of the NI Act. And of course, he can always file a suit for recovery wherever the cause of action arises in civil laws. [**Dashrath Rupshingh Rathod vs. State of Maharastra, (2014) 9 SCC 129**]

**Ss. 141, 138—Offences by company—Dishonour of cheque—Proceeding initiated against company and its Managing Director—Managing Director of company cannot be prosecuted alone—Complaint against company already quashed—Order of High Court that proceeding against appellant—Managing Director can be continued even in absence of company—Liable to be set aside**

Again the same question was considered by three Judge Bench of this Court in *Aneeta Hada v. Godfather Travels and Tours Pvt. Ltd.* (2012) 5 SCC 661. The Court noticed the decisions in *Anil Hada* (supra) case and *Aneeta Hada* (supra) case. The three Judge Bench while partly overruled the finding of *Anil Hada* (supra) affirmed the decision of *Aneeta Hada* (supra). This Court held

“51. We have already opined that the decision in *Sheoratan Agarwal* (AIR 1984 SC 1824) runs counter to the ratio laid down in *C.V. Parekh* which is by a larger Bench and hence, is a binding precedent. On the aforesaid ratiocination, the decision in *Anil Hada* has to be treated as not laying down the correct law as far as it states that the Director or any other officer can be prosecuted without impleadment of the company. Needless to emphasise, the matter would stand on a different footing where there is some legal impediment and the doctrine of *lex non cogit ad impossibilia* gets attracted.”

“53. It is to be borne in mind that Section 141 of the Act is concerned with the offences by the company. It makes the other persons vicariously liable for commission of an offence on the part of the company. As has been stated by us earlier, the vicarious liability gets attracted when the condition precedent laid down in Section 141 of the Act stands satisfied. There can be no dispute that as the liability is penal in nature, a strict construction of the provision would be necessitous and, in a way, the warrant.”

“58. Applying the doctrine of strict construction, we are of the considered opinion that commission of offence by the company is an express condition precedent to attract the vicarious liability of others. Thus, the words “as well as the company” appearing in the section make it absolutely unmistakably clear that when the company can be prosecuted, then only the persons mentioned in the other categories could be vicariously liable for the offence subject to the averments in the petition and proof thereof. One cannot be oblivious of the fact that the company is a juristic person and it has its own respectability. If a finding is recorded against it, it would create a concavity in its reputation. There can be situations when the corporate reputation is affected when a Director is indicted.

59. In view of our aforesaid analysis, we arrive at the irresistible conclusion that for maintaining the prosecution under Section 141 of the Act, arraigning of a company as an accused is imperative. The other categories of offenders can only be brought in the drag-net on the touchstone of vicarious liability as the same has been stipulated in the provision itself. We say so on the basis of the ratio laid down in C.V. Parekh (AIR 1971 SC 447) which is a three-Judge Bench decision. Thus, the view expressed in Sheoratan Agarwal does not correctly lay down the law and, accordingly, is hereby overruled. The decision in Anil Hada is overruled with the qualifier as stated in para 51. The decision in Modi Distillery (AIR 1988 SC 1128) has to be treated to be restricted to its own facts as has been explained by us hereinabove.”

In the present case, the High Court by impugned judgment dated 13th August, 2007 held that the complaint against respondent no.2-Company was not maintainable and quashed the summon issued by the Trial Court against respondent no.2-Company. Thereby, the Company being not a party to the proceedings under Section 138 read with Section 141 of the Act and in view of the fact that part of the judgment referred to by the High Court in Anil Hada (supra) has been overruled by three Judge Bench of this Court in Aneeta Hada (supra), we have no other option but to set aside the rest part of the impugned judgment hereby the High Court held that the proceedings against the appellant can be continued even in absence of the Company. We, accordingly, set aside that part of the impugned judgment dated 13th August, 2007 passed by the High Court so far it relates to appellant and quash the summon and proceeding pursuant to complaint case No.698 of 2001 qua the appellant. **[Anil Gupta vs. Star India Pvt. Ltd., AIR 2014 SC 3078]**

**Article 226 of Constitution of India – Public Interest Litigation Interference –High Court directed for return of complaints for its presentation before the competent Courts. It was held that the order of High Court need no interference as it simply requires the Magistrate to examine and return the complaints, if they do not have jurisdiction to entertain the same. Civil Appeal dismissed. (2009)1 SCC 720, AIR 1966 SC 81, (1997)9 SCC 377, (2004) 7 SCC 338 ref.**

The general rule stipulated under Section 177 of Cr.P.C applies to cases under Section 138 of the Negotiable Instruments Act. Prosecution in such cases can, therefore, be launched against the drawer of the cheque only before the Court within whose jurisdiction the dishonour takes place except in situations where the offence of dishonour of the cheque punishable under Section 138 is committed along with other offences in a single transaction within the meaning of Section 220(1) read with Section 184 of the Code of Criminal Procedure or

is covered by the provisions of Section 182(1) read with Sections 184 and 220 thereof.”

We have no hesitation in holding that the issue of a notice from Delhi or deposit of the cheque in a Delhi bank by the payee or receipt of the notice by the accused demanding payment in Delhi would not confer jurisdiction upon the Courts in Delhi. What is important is whether the drawee bank who dishonoured the cheque is situate within the jurisdiction of the Court taking cognizance. In that view, we see no reason to interfere with the order passed by the High Court which simply requires the Magistrate to examine and return the complaints if they do not have the jurisdiction to entertain the same in the light of the legal position as stated in *Harman Electronics Private Limited and Anr. V. National Panasonic India Private Limited*, (2009) 1 SCC 720. All that we need to add is that while examining the question of jurisdiction the Metropolitan Magistrates concerned to whom the High Court has issued directions shall also keep in view the decision of this Court in **Dashrath Rupsingh Rathod v. State of Maharashtra and Anr.**, (2014) 9 SCALE 97 case. [**Vinay Kumar Shailendra v. Delhi High Court Legal Services Comm.**, 2014(32) LCD 2078 (SC)]

**Territorial Jurisdiction of Trial Court at the place where drawee bank situates.**

This Court has in that case held that presentation of the cheque at a place of the choice of the complainant or issue of a notice from any such place do not constitute ingredients of the offence under Section 138 of the Negotiable Instruments Act. We do not think that issue of a statutory notice can by itself and cannot, therefore, confer jurisdiction upon the Court from where such acts are performed. Although the complaint does not claim jurisdiction for the Court at Gurgaon on the ground that the cheque was presented for collection there yet in the Counter affidavit, the respondent has tried to justify the filing of the complaint on that ground. Dashrath Rupsingh’s case, however, does not, as mentioned above, accept presentation of a cheque to be a valid presentation for purposes of limitation within the meaning of Section 138 unless the same is to the drawee bank. That is the view taken even in *Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd.* (2001) 3 SCC 609. On either ground, therefore, the Courts in Gurgaon could not assume jurisdiction. Following the decisions in Dashrath Rupsingh’s and *Ishar Alloy Steels* cases, we have no hesitation in allowing the petition and directing transfer of the complaint to the competent Court to entertain the same. [**Mahesh Stationeries & Another v. Indiabulls Financial Services Limited**, (2014) 8 SCC 880]



## **Prevention of Food Adulteration Act**

### **Ss. 7 and 16(1)(a) – Ambit and scope – Storage of adulterated article of food other than for sale does not come within mischief of Section 16 of the Act**

When the petitioner was posted as the Superintendent of District Jail, Bihar Sharif, the Food Inspector visited the jail premises and collected samples of various materials including Haldi and Rice. Those articles were stored for consumption of the prisoners. The samples so collected were sent for examination and analysis and, according to the report of the Public Analyst, Haldi and Rice were not found in conformity with the prescribed standard and, therefore, held to be adulterated. Accordingly, two separate prosecution reports were submitted alleging commission of an offence under Section 16 of the Prevention of Food Adulteration Act, 1954. The learned Chief Judicial Magistrate took cognizance of the offence under Section 16(1)(a) of the Act and by order dated 18th of March, 2006 directed for issuance of process in both the cases. The petitioner assailed both the orders in separate revision applications filed before the Sessions Judge; but both were dismissed. Thereafter, the petitioner preferred two separate applications, being Criminal Miscellaneous No. 15527 of 2010 and Criminal Miscellaneous No. 15471 of 2010 under Section 482 of the Code of Criminal Procedure before the High Court. The High Court, by the orders impugned in the present special leave petitions, has dismissed both the criminal miscellaneous applications. It is in these circumstances the petitioner has filed the present special leave petitions.

In the present case, according to the prosecution, the appellant, a Superintendent of Jail, had stored Rice and Haldi and, therefore, his act comes within the mischief of Section 7 and 16 of the Act. In view of the aforesaid, what needs to be decided is as to whether the expression 'store' as used in Section 7 and Section 16 of the Act would mean storage simpliciter or storage for sale. Court has referred to the provisions of Section 7, Section 10 and Section 16 of the Act and from their conjoint reading, it will appear that the Act is intended to prohibit and penalise the sale of any adulterated article of food. In court's opinion, the term 'store' shall take colour from the context and the collocation in which it occurs in Section 7 and 16 of the Act. Applying the aforesaid principle, Court is of the opinion, that 'storage' of an adulterated article of food other than for sale does not come within the mischief of Section 16 of the Act.

In the case in hand, it is not the allegation that the appellant had stored Haldi and Rice for sale. Therefore, in Court's opinion, the allegations made do

not constitute any offence and, hence, the prosecution of the appellant for an offence under Section 16(1)(a) of the Act shall be an abuse of the process of the Court.

In the result court allow these appeals, set aside the impugned orders and quash the appellant's prosecution in both the cases. (**Rupak Kumar v. State of Bihar & anr., 2014 FAJ 417 (SC)**)

## **Rent Laws**

### **Scope of Revisional Jurisdiction in Rent Cases & Eviction Cases**

Conceptually, revisional jurisdiction is a part of appellate jurisdiction but it is not vice-versa. Both, appellate jurisdiction and revisional jurisdiction are creatures of statutes. No party to the proceeding has an inherent right of appeal or revision. An appeal is continuation of suit or original proceeding, as the case may be. The power of the appellate court is co-extensive with that of the trial court. Ordinarily, appellate jurisdiction involves re-hearing on facts and law but such jurisdiction may be limited by the statute itself that provides for appellate jurisdiction. On the other hand, revisional jurisdiction, though, is a part of appellate jurisdiction but ordinarily it cannot be equated with that of a fullfledged appeal. In other words, revision is not continuation of suit or of original proceeding. When the aid of revisional court is invoked on the revisional side, it can interfere within the permissible parameters provided in the statute. It goes without saying that if a revision is provided against an order passed by the tribunal/appellate authority, the decision of the revisional court is the operative decision in law. In our view, as regards the extent of appellate or revisional jurisdiction, much would, however, depend on the language employed by the statute conferring appellate jurisdiction and revisional jurisdiction.

With the above general observations, we shall now endeavour to determine the extent, scope, ambit and meaning of the terms "legality or propriety", "regularity, correctness, legality or propriety" and "legality, regularity or propriety" which are used in three Rent Control Acts under consideration need determination. The ordinary meaning of the word 'legality' is lawfulness. It refers to strict adherence to law, prescription, or doctrine; the quality of being legal. The term 'propriety' means fitness; appropriateness, aptitude; suitability; appropriateness to the circumstances or condition conformity with requirement; rules or principle, rightness, correctness, justness, accuracy. The terms 'correctness' and 'propriety' ordinarily convey the same meaning, that is, something which is legal and proper. In its ordinary meaning and substance,

‘correctness’ is compounded of ‘legality’ and ‘propriety’ and that which is legal and proper is ‘correct’. The expression “regularity” with reference to an order ordinarily relates to the procedure being followed in accord with the principles of natural justice and fair play.[**Hindustan Petroleum Corpn. Ltd. v. Dilbahar Singh,(2014)9 SCC 78**]

## **Service Law**

### **Departmental Enquiry- Change of Enquiry Officer-Enquiry Officer not to be changed unless good reasons are recorded**

There is no doubt that the Bank must record reasons for a change in the enquiry officer and in case, it did not do so. But, in the facts and circumstances of this case, in our opinion, the failure to record reasons would not be fatal to the inquiry nor would it be enough reason to vitiate the enquiry against Penji, unless some prejudice has been caused him. However, nothing by way of prejudice to Penji has been shown either to the High court or to us. Since no prejudice has been caused to Penji by the appointment of Nidhir Ranjan Kar as the fresh Enquiry Officer in place of Phuntsok Rinchin, we reject the view of the High Court that the inquiry against Penji was vitiated. On the contrary, in terms of the order passed by the High Court in the first round of litigation, the Bank was required to appoint an Enquiry Officer to conduct a further inquiry against Penji. On the voluntary retirement of Phuntsok Rinchin another Enquiry Officer had necessarily to be appointed and that step was, accordingly, taken by the Bank. We see no basis for any complaint by Penji and there is also no allegation of any Mala Fides or bias or any other adverse consequence insofar as Penji is concerned in the appointment of a fresh Enquiry Officer.

In the circumstances, we set aside the judgment and order passed by the High Court and hold that the first part of paragraph 23.7.2 of the Procedure for taking Disciplinary Action: Award Staff is not a mandatory provision. However, we emphasize the mandatory requirement of recording reasons by the Bank for changing an Enquiry Officer during the continuance of a departmental enquiry against an officer. In the facts of the present appeal, the appointment of a fresh Enquiry Officer was inevitable. (**State Bank of India v. BOA Penji, (2014(143) FLR 779 Supreme Court**)

### **Dismissal for misconduct of abusing and threatening superiors—Held, harsh and disproportionate to misconduct**

The case at hand, we are of the view that the punishment of dismissal from service for the misconduct proved against the appellant is disproportionate to the charges. In *Ram Kishan vs. Union of India & Ors.*, reported in (1995) 6 SCC 157, the delinquent employee was dismissed from service for using

abusive language against superior officer. On the facts and circumstances of the case, this Court held that the punishment was harsh and disproportionate to the gravity of the charge imputed to the delinquent and modified the penalty to stoppage of two increments with cumulative effect.

The High Court has relied on the judgment in *Mahindra and Mahindra Ltd. vs. N.B.Narawade*, (2005) 3 SCC 134, wherein it was held that the penalty of dismissal on the alleged use of filthy language is not disproportionate to the charge as it disturbs the discipline in the factory. We are of the view that in the facts and circumstances of the present case, the above decision may not be applicable. Considering the totality of the circumstances, in our view, the punishment of dismissal from service is harsh and disproportionate and the same has to be set aside. [**Collector Singh vs. L.M.L. Ltd., Kanpur, 2014 (8) Supreme 123**]

**Promotion—Writ jurisdiction—Scope—High Court cannot sit in appeal over assessment made by D.P.C. and cannot direct to promote a person to higher post without a plausible ground**

It is settled that High Court under Article 226 of the Constitution of India cannot sit in appeal over the assessment made by the DPC. If the assessment made by the DPC is perverse or is not based on record or proper record has not been considered by the DPC, it is always open to the High Court under Article 226 of the Constitution to remit the matter back to the DPC for recommendation, but the High Court cannot assess the merit on its own, on perusal of the service record of one or the other employee.

The selection to the post of Addl. DIG is based on merit-cum-suitability which is to be adjudged on the basis of ACRs of different candidates. The merit position can be adjudged by the Selection Committee on appreciation of their Character Roll. In absence of the Character roll of other candidates, who were also in the zone of promotion, it is not open to the High Court to assess the merit of one individual who moves before the High Court, to give a finding whether he comes within the zone of promotion or fit for promotion.

The Departmental Promotion Committee consists of a Chairman and the members. Even if bias is alleged against the Chair-person, it cannot be presumed that all the members of the Committee were biased. No ground has been made out by the respondent to show as to why the assessment made by the DPC is not to be accepted. The High Court failed to notice the aforesaid fact and wrongly discarded the assessment made by the D.P.C.

It is also settled that the High Court under Article 226 can remit the matter for reconsideration if a person was not properly considered for a

promotion for which he was eligible. But it cannot direct to promote a person to the higher post, without giving a plausible ground. [**Union of India vs. S.P. Nayyar, 2014 (4) ESC 491 (SC)**]

**Punishment – Stoppage of increment with and without commutative effect  
– Nature of**

The controversy has arisen with regard to implementation of the order of punishment imposed by the authority on the delinquent employee. The courts below have opined that though it is mentioned in the order of punishment that there is stoppage of five increments without cumulative effect which is a minor punishment yet the manner of implementation converts it to a major punishment. There can be no cavil over the proposition that when a punishment of stoppage of an increment with cumulative effect is imposed, it is a major punishment. In this regard, court may refer with profit to the decision in *Kulwant Singh Gill v. State of Punjab*, 1991 Supp(1) SCC 504 wherein it has been held that withholding of increments of pay simpliciter without any hedge over it certainly would be a minor punishment but withholding of increments with cumulative effect, the consequences being quite hazardous to the employee, it would come in the compartment of major punishment. [**Punjab State Electricity Board Now Punjab State Power Corporation Ltd. vs. Raj Kumar Goel, 2014(8) Supreme 461**]

**Termination – Reinstatement – Consideration of – wrong termination does not necessarily warrant reinstatement with back wages Lump sum confirmation may meet the ends of justice in suitable cases.**

The case at hand, in our opinion, is one such case where reinstatement must give way to award of compensation. We say so because looking to the totality of the circumstances, the reinstatement of the respondent in service does not appear to be an acceptable option. Monetary compensation, keeping in view the length of service rendered by the respondent, the wages that he was receiving during that period which according to the evidence was around Rs.24.75 per day should sufficiently meet the ends of justice. Keeping in view all the facts and circumstances, we are of the view that award of a sum of Rs.2,50,000/- (Rupees Two Lacs Fifty Thousand only) should meet the ends of justice. [**Bhavnagar Municipal Corporation etc. vs. Jadeja Govubha Chhanubha & Anr., 2014(8) Supreme 353**]

**Article 14 – Article 14 does not envisage negative equality.**

The plea of parity with two other person who were recruited can also not help the respondent. This aspect of the matter was also gone into by this Court in *Mehar Singh* and it was held:

“36. The Screening Committee’s Proceedings have been assailed as being arbitrary, unguided and unfettered. But, in the present cases, we see no evidence of this. However, certain instances have been

pointed out where allegedly persons involved in serious offences have been recommended for appointment by the Screening Committee. It is well settled that to such cases the doctrine of equality enshrined in Article 14 of the Constitution of India is not attracted. This doctrine does not envisage negative equality [Fuljit Kaur, (2010(11)SCC 455)]. It is not meant to perpetuate illegality or fraud because it embodies a positive concept.”

[State of M.P. & Ors. vs. Parvez Khan, 2014(8) Supreme 371]

### **Transfer of Property Act**

**S.43—Doctrine of feeding the estoppel—Transferor, son fraudulently transferred property owned by his mother—Never acquired by succession, inheritance or otherwise any interest during his lifetime—Thus, doctrine of feeding the estoppels u/s. 43 would not be attracted as against his heirs who succeeded Stridhan Property of their grandmother—Purchaser cannot claim benefit of such subsequent acquisition of right.**

In this instant case the concurrent finding of facts recorded by the two courts based on the records that the original plaintiff was the owner and title holder of the said property but by making false and fraudulent representation by her son that the property belonged to him, transferred the same in favour of the appellant. During the pendency of the first appeal before the district court, the vendor (son of the original plaintiff) died. Although on the death, his children did not inherit or succeeded any interest in the property, through their deceased father, but they were impleaded as legal representatives in the appeal. However, during the pendency of this appeal, the original plaintiff, namely, Bannamma died. After her death, the respondents being the grand children inherited and acquired interest in the suit property. Admittedly, the deceased son of the original plaintiff, namely Nagi Reddy never acquired any interest in the suit property owned by his mother during his life time. In the aforesaid premises, the doctrine of feeding the estoppel would not come into operation as against the grand children of the original plaintiff. S. 43 applies when the transferor having no interest in the property transfers the same but subsequently acquires interest in the said property, the purchaser may claim the benefit of such subsequent acquisition of the property by the transferor. Had it been a case where the son ‘N’ during his life time succeeded or inherited the property but dies subsequently, then to some extent it could have been argued that the heirs of ‘N’ who inherited the property on the death of their father would be bound by the principle of estoppels. Therefore, in a case where a transferor never acquired by succession, inheritance or otherwise any interest in the property during his life time then the provision of S. 43 will not come into operation as against the heirs who succeeded the stridhan property of their grandmother.

**[Agricultural Produce Marketing Committee vs. Bannama (D) by LRs., AIR 2014 SC 3000]**

**Ss. 62, 60—Usufructuary mortgage—Redemption of—Limitation—Usufructuary mortgagor's right u/s. 62 continue till mortgage money is paid—Mere expiry of period of 30 years from date of mortgage—Does not extinguish right of mortgagor u/s. 62.**

While in case of any other mortgage, right to redeem is covered u/s. 60, in case of usufructuary mortgage, right to recover possession is dealt with u/s. 62 and commences on payment of mortgage money out of the usufructs or partly out on payment or deposit by the mortgagor. This distinction in a usufructuary mortgage and any other mortgage is clearly borne out from provisions of Sections 58, 60 and 62 of the T.P. Act read with Article 61 of the Schedule to the Limitation Act. Usufructuary mortgage cannot be treated at par with any other mortgage, as doing so will defeat the scheme of Section 62 of the T.P. Act and the equity. This right of the usufructuary mortgagor is not only an equitable right, it has statutory recognition u/s. 62 of the T.P. Act. There is no principle of law on which this right can be defeated. Any contrary view, which does not take into account the special right of usufructuary mortgagor u/s. 62 of the T.P. Act, has to be held to be erroneous on this ground or has to be limited to a mortgage other than a usufructuary mortgage. In cases where distinction in usufructuary mortgagor's right u/s. 62 of the T.P. Act has been noted, right to redeem has been held to continue till the mortgage money is paid for which there is no time limit while in other cases right to redeem has been held to accrue on the date of mortgage resulting in extinguishment of right of redemption after 30 years. Special right of usufructuary mortgagor u/s. 62 of the T.P. Act to recover possession commences in the manner specified therein, i.e., when mortgage money is paid out of rents and profits or partly out of rents and profits and partly by payment or deposit by mortgagor. Until then, limitation does not start for purposes of Article 61 of the Schedule to the Limitation Act. A usufructuary mortgagee is not entitled to file a suit for declaration that he had become an owner merely on the expiry of 30 years from the date of the mortgage. Thus, in case of usufructuary mortgage, mere expiry of a period of 30 years from the date of creation of the mortgage does not extinguish the right of the mortgagor u/s. 62 of the T.P. Act. **[Singh Ram (D) Thr. L.Rs. vs. Sheo Ram and others, AIR 2014 SC 3447]**

**Ss. 108(e), 111—Determination of lease—Rights and liabilities of lessee—Destruction of house/building constructed on leasehold property—Does not determine tenancy right of occupant**

It is reflectible that in *Vannattankandy Ibrayi's* case AIR 2003 SC 4453 : 2000 AIR SCW 4592), the two-Judge Bench observed that the rights stand extinguished as on the distinction of the demise, for there is destruction of the superstructure and in its non-existence there is no subject matter. Thus, the land has been kept out of the concept of subject matter. In our considered opinion, the Court in the said case failed to appreciate that there are two categories of subject-matters, combined in a singular capsule, which is the essence of provision under the Transfer of Property Act and not restricted to a singular one, that is, the superstructure. In *T. Lakshmipathi*, AIR 2003 SC 2427: 2003 AIR SCW 2436, the Court took note of the fact that the land and superstructure standing on it as a singular component for the purpose of tenancy. It is in tune with the statutory provision. Therefore, we agree with the proposition stated therein to the effect that "in the event of the tenancy having been created in respect of a building standing on the land, it is the building and the land which are both components of the subject-matter of demise and the destruction of the building alone does not determine the tenancy when the land which was the site of the building continues to exist". On the touchstone of this analysis, we respectfully opine that the decision rendered in *Vannattankandy Ibrayi* (supra) does not correctly lay down the law and it is, accordingly, overruled. [M/s. **Shaha Ratansi Khimji & Sons vs. Proposed Kumbhar Sons Hotel P. Ltd.**, AIR 2014 SC 2895]

**S.123—Gift—Validity—S.123** supersedes rules of Hindu Laws insofar as such rules required deliver of possession to donee—Thus delivery of possession is not an essential prerequisite for making of valid gift in case of immovable property. [**K. Balakrishnan vs. K. Kamalam & Ors.**, (2004) 1 SCC 581: AIR 2004 SC 1257, Followed]

**S.123—Gift—Registered and accepted by donee—Recitals therein proved transfer of absolute title in gifted property from donor to donee—Fact that donor retained only right to use property during her lifetime—Does not in any way affect transfer of ownership in favour of donee by donor.** [**Renikuntla Rajamma (D) by LRs. Vs. K. Sarwanamma**, AIR 2014 SC 2906]

**Section 122 and 126 of Transfer of Property Act, 1882 – Revocation of Gift – The Trial Court decreed the suit holding that the gift-deed was validly executed and accepted by the plaintiff – done and is irrevocable in nature. It was held that the revocation of a validly made gift-deed was legally impermissible. Civil Appeal dismissed.**

That brings us to the decisions of this Court which have led to this reference. In *K. Balakrishnan v. K. Kamalam & Ors.*, (2004)1 SCC 581 case

the donor executed a gift deed of a specified share of the property inherited by her from her maternal grandfather in favour of her minor son who was the donee-appellant before the Court and her four year old daughter. The property gifted included a school building. The gift deed stipulated that the responsibility to sign in regard to the said school and the right to income would be with the donor during her lifetime and thereafter would be vested in the donee. After the execution of the gift deed the donor cancelled the same and made a will bequeathing the property in favour of her daughter whereupon the donee-appellant filed a suit for declaration of his title to the suit property on the basis of the gift and a further declaration for annulment of the cancellation deed and the will executed by the donor. The Trial Court dismissed the suit while the First Appellate Court decreed the same. The High Court restored the view taken by the Trial Court and held that when the donor had reserved to herself the right to sign the papers with respect to management of the school and the right to take usufruct from the property where the school was situated, no property was transferred under the deed. In appeal before this Court, the view taken by the High Court was reversed and that taken by the First Appellate Court restored. This Court held:

“We have critically examined the contents of the gift deed. To us, it appears that the donor had very clearly transferred to the donees ownership and title in respect of her 1/8th share in properties. It was open to the donor to transfer by gift title and ownership in the property and at the same time reserve its possession and enjoyment to herself during her lifetime. There is no prohibition in law that ownership in a property cannot be gifted without its possession and right of enjoyment. Under Section 6 of the Transfer of Property Act “property of any kind may be transferred” except those mentioned in clauses (a) to (i). Section 6 in relevant part reads thus:

“6. What may be transferred - Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force.

(a) \* \* \*

(b) A mere right to re-entry for breach of a condition subsequent cannot be transferred to anyone except the owner of the property affected thereby.

(c) \* \* \*

(d) An interest in property restricted in its enjoyment to the owner personally cannot be transferred by him.

(e) A mere right to sue cannot be transferred.”

Clause (d) of Section 6 is not attracted on the terms of the gift deed herein

because it was not a property, the enjoyment of which was restricted to the owner personally. She was absolute owner of the property gifted and it was not restricted in its enjoyment to herself. She had inherited it from her maternal father as a full owner. The High Court was, therefore, apparently wrong in coming to the conclusion that the gift deed was ineffectual merely because the donor had reserved to herself the possession and enjoyment of the property gifted.” (emphasis supplied)

We are in respectful agreement with the statement of law contained in the above passage. There is indeed no provision in law that ownership in property cannot be gifted without transfer of possession of such property. As noticed earlier, Section 123 does not make the delivery of possession of the gifted property essential for validity of a gift. It is true that the attention of this Court does not appear to have been drawn to the earlier decision rendered in *Naramadaben Maganlal Thakker v. Pranjivandas Maganlal Thakker and Ors.*, (1997)2 SCC 255, where this Court had on a reading of the recital of the gift deed and the cancellation deed held that the gift was not complete. This Court had in that case found that the donee had not accepted the gift thereby making the gift incomplete. This Court, further, held that the donor cancelled the gift within a month of the gift and subsequently executed a Will in favour of the appellant on a proper construction of the deed and the deed cancelling the same this Court held that the gift in favour of the donee was conditional and that there was no acceptance of the same by the donee. The gift deed conferred limited right upon the donee and was to become operative after the death of the donee. This is evident from the following passage from the said judgment:

“7. It would thus be clear that the execution of a registered gift deed, acceptance of the gift and delivery of the property, together make the gift complete. Thereafter, the donor is divested of his title and the donee becomes the absolute owner of the property. The question is whether the gift in question had become complete under Section 123 of the TP Act? It is seen from the recitals of the gift deed that Motilal Gopalji gifted the property to the respondent. In other words, it was a conditional gift. There is no recital of acceptance nor is there any evidence in proof of acceptance. Similarly, he had specifically stated that the property would remain in his possession till he was alive. Thereafter, the gifted property would become his property and he was entitled to collect mesne profits in respect of the existing rooms throughout his life. The gift deed conferred only limited right upon the respondent-donee. The gift was to become operative after the death of the donor and he was to be entitled to have the right to transfer the property absolutely by way of gift or he would be entitled to collect the

mesne profits. It would thus be seen that the donor had executed a conditional gift deed and retained the possession and enjoyment of the property during his lifetime.....”

The above decision clearly rests on the facts of that case. If the gift was conditional and there was no acceptance of the donee it could not operate as a gift. Absolute transfer of ownership in the gifted property in favour of the donee was absent in that case which led this Court to hold that the gift was conditional and had to become operative only after the death of the donee. The judgment is in that view clearly distinguishable and cannot be read to be an authority for the proposition that delivery of possession is an essential requirement for making a valid gift.

In the case at hand as already noticed by us, the execution of registered gift deed and its attestation by two witnesses is not in dispute. It has also been concurrently held by all the three courts below that the donee had accepted the gift. The recitals in the gift deed also prove transfer of absolute title in the gifted property from the donor to the donee. What is retained is only the right to use the property during the lifetime of the donor which does not in any way affect the transfer of ownership in favour of the donee by the donor. [Renikuntla Rajamma (D) v. K. Sarwanamma, 2014(32) LCD 2063 (SC)]

### **Words and Phrases**

**“Aggrieved person”, “Domestic relationship” and “shared household”.**

**Protection of Women from Domestic Violence Act, 2005- Ss. 20 and 12- Nature of relief available under S.20.- Distinguished from maintenance.**

**Held-**monetary relief as stipulated under S. 20 of the DVA Act is different from maintenance, which can be in addition to an order of maintenance under S.125 Cr.P.C. or any other law.

Section 2(a) of the Domestic Violence Act, 2005 defines “aggrieved person” as follows:

“2. (a) ‘**aggrieved person**’ means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;”

Therefore, it is clear that apart from the woman who is in a domestic relationship, any woman who has been, in a domestic relationship with the respondent, if alleges to have been subjected to act of domestic violence by the respondent comes within the meaning of “aggrieved person”.

Definition of “Domestic relationship” reads as follows:

“2. (f) ‘**Domestic relationship**’ means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage or through a

relationship in the nature of marriage adoption or are family living together as joint family;”

From the aforesaid provision we find that a person aggrieved (wife herein), who at any point of time has lived together with husband (first respondent) in a shared household, is also covered by the meaning of “domestic relationship”.

Section 2(s) defines “shared household”:

“2.(s) ‘**Shared household**’ means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household;”.

An act of domestic violence once committed, subsequent decree of divorce will not absolve the liability of the respondent from the offence committed or to deny the benefit to which the aggrieved person is entitled under the Domestic Violence Act, 2005 including monetary relief under Section 20, child custody under Section 21, compensation under Section 22 and interim or ex parte order under Section 23 of the Domestic Violence Act, 2005.

Both the Sessions Judge and the High Court failed to notice the aforesaid provisions of the Act and the fact that the FIR was lodged much prior or the alleged divorce between the parties and erred in holding that the petition under Section 12 was not maintainable.[**Juveria Abdul Majid Patni vs. Atif Iqbal Mansoori, (2014) 10 SCC 736**]

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## **PART – 2 (HIGH COURTS)**

### **Arbitration and Conciliation Act**

**S. 34 – Arbitration award challenged – Scope of interference by court is very limited, it is permissible, by court only when award suffers by an error apparent on fact of award or Arbitration has not followed statutory legal provision.**

In our opinion, the scope of interference of the court is very limited, Court would not be justified in reappraising the material on record and substituting its own view in place of the Arbitrator's view. Where there is an error apparent on the face of the record or the Arbitrator has not followed the statutory legal position, then and then only it would be justified in interfering with the award published by the Arbitrator. Once the Arbitrator has applied his mind to the matter before him, the Court cannot reappraise the matter as if it were an appeal and even if two views are possible the view taken by the Arbitrator would prevail.

We find that the reasoning given by the Division Bench of the High Court cannot be said to be perverse. Furthermore, the appellant never terminated the Agreement or requested the first respondent to take back the machinery. Now, at this stage it would not be proper for us to express further opinion in the matter when the matter/dispute has already been concluded by the Arbitrator and the award has been affirmed by the High Court. [**Navodaya Mass Entertainment Ltd. v. J.M. Combines, 2014(6) AWC 5740(SC)**]

### **Civil Procedure Code**

**Section 96 of Civil Procedure Code, 1908 – First Appeal – Suit for permanent injunction was dismissed on the basis that there are material contradictions in the statement of plaintiff and his witnesses**

Apart from above, there are material contradictions in statement of

plaintiff and his witnesses which have been discussed by trial court in detail. However, it is pertinent to mention that though the property in suit is alleged to be ancestral of plaintiff and is said to have been inherited by father of plaintiff from his father Dhannu, and father had a brother Govind Panwari and five sons Beghraj, Purshottam, Totaram, Gulab Singh and Chandra Sen, but name of none of them finds place in any document of title or property in suit, except that of Kundan Singh, and that with is also alongwith Layalpur Engineering Company & four others in demand and collection register for 1978-83 and with Shyam Singh in demand and collection register for 1994-97, which has been deleted.

Trial court has taken note of the fact that though the plaintiff has claimed that the property as his ancestral but except for the document pertaining house tax and water tax, no other evidence has been produced to demonstrate that at any point of time, the name of his grandfather or father was ever recorded in any of the document pertaining title of the property. Trial court after analyzing the evidence on record has further held that not even a single document, which may demonstrate the title or possession of the ancestors of the plaintiff, has been produced in by plaintiff in order to prove his case and has also failed to establish in what manner the property was acquired by his ancestors. The trial court has rightly held that the plaintiff has neither pleaded nor proved by any iota of evidence, the source of title and possession over the property in suit.

It is settled principle of law that the plaintiff has to stand on his own legs and for obtaining decree for permanent injunction has to prove is exclusive right, title and possession over the property in suit. The plaintiff has claimed property in suit to be his ancestral property of which he is exclusive owner in possession, but he has miserably failed his right, title or possession over the same by any reliable, independent or cogent documentary or oral evidence. The findings recorded by the trial court are based on proper appraisal of oral as well as documentary evidence on record. [**Chandrasen v. Surendra Verma & Others, 2014(3) ARC 505**]

**Section 100 of Civil Procedure Code, 1908 – Article 111 of the Limitation Act, 1963 – Suit for demolition of construction and possession.**

There is clear finding of the lower appellate court that the construction over the land in dispute exists from before 1936. This finding of the lower appellate court is based on reasonings and evidence on record. The defendant-respondent Babu Lal has entered into witness box and has categorically stated that his constructions exist from before the year 1936. Apart from his

statement, there are on-oath statements of the defendants witnesses, namely, Abdul Baqi, Abdul Bari and Narain Das, who also supported the case of the defendants-respondents. According to witness Abdul Baqi (DW-2), the house of defendant-respondent Babu Lal is about 150 feet x 40 feet and exists for the last about 40-50 years. He states that his house was kachcha previously and now his house is pucca. Even the plaintiff witness Sri Chaterjee has supported the case of the defendants-respondents. He has stated in the court that in 1962 he had an occasion to see the assessment register of 1936 and then people told him that Babu Lal got his name entered in that assessment register fraudulently. Thus, there was an entry in favour of defendant Babu Lal in the assessment register of 1936. In this way, the assessment register of 1936, maintained by the plaintiff, itself shows the building of the defendants on the disputed land. The plaintiff/appellant did not produce that assessment register in the court while the same was in his custody. So non-production of the same by the appellant Municipality goes against the Municipality under Section 114 (g) of the Evidence Act and it may be presumed that the said assessment register, if had been produced by the appellant Municipality that would be unfavourable to it. The entry of the building of the defendants-respondents in the assessment year of 1936 goes to show that the defendants-respondents were in possession of the disputed property from before the year 1936 and if the possession of the defendants-respondents over the disputed property is presumed to be on 31.12.1935, in the maximum side in that case the suit ought to have been filed by the plaintiff-appellant up to 31.12.1935 as per Article 111 of the Limitation Act but the same was filed on 11.10.1996. So the finding of the lower appellate court that the suit is barred by time, is well founded, supported with reasoning and is based on evidence. Even if it is presumed that the pucca construction was raised on the disputed land in the year 1950, in that case also the period of limitation cannot be said to start from the year 1950 because the day of change of nature of construction cannot be the day of starting the period of limitation. Therefore, I find no perversity in the finding of the lower appellate court as regards the suit being time barred. In this reference, the ruling of the Hon'ble Supreme Court given in *Kuldeep Singh v. Commissioner of Police and others*, AIR 1999 SC 677, may be referred to. In this ruling, the Hon'ble Supreme Court has held that if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusion of the lower appellate court would not be treated as perverse and the finding of the lower appellate court would not be interfered with. As I have already stated that the finding of the lower appellate court that the suit is time barred, is based on evidence and reasoning, so I find no ground to interfere with this finding. The finding of the lower appellate court is correct. The answer of the question

formulated at the admission stage is accordingly answered. [**Nagar Palika v. Babu Lal, 2014(3) ARC 501**]

**Section 100 – Second Appeal – First suit instituted by plaintiff on basis said registered gift deed in her favour whereupon injunction sought against defendants from interfering in possession of plaintiff while, second suit by defendant of first suit on basis of registered “Will” as specified**

Substantial questions of law which have arisen in the matter require adjudication by this Court are as under :-

- i. Whether Lower Appellate Court in reversing findings of Trial Court with regard to issue whether property in dispute was self acquired property of Smt. Basanti Devi or joint family property has committed manifest error of law since there was no evidence to support findings of Lower Appellate Court
- ii. Whether gift deed can be held validly registered after the death of its executor?
- iii. Whether there is any presumption that immoveable property of Hindu Family will be joint family property unless proved otherwise?
- iv. Whether Will in this case has been proved in accordance with law?

First, I take up questions 1 and 3 together.

Smt. Champa Devi, one of the daughters-in-law of Smt. Basanti Devi has based her claim on Gift Deed which allegedly has been executed by Smt. Basanti Devi. She has fairly admitted the property in dispute to be that of Smt. Basanti Devi. Four sons of Smt. Basanti Devi (except the husband of Smt. Basanti Devi) have pleaded that property in dispute is joint family property, but, they have also based their claim on a will executed by Smt. Basanti Devi. The question of execution of will by Smt. Basanti Devi could not have arisen unless property belong to her. The concept of Joint Hindu Family Property flows from the male head of family and its branches and not from the female. No valid explanation has come forward from the plaintiff of second suit to justify execution of alleged will by Smt. Basanti Devi if the property did not belong to her but was a joint family property. Even if the will would not have been there, after death of Smt. Basanti Devi, intestate, the property would have devolved equally upon all the sons and the husband, if alive, at that time. Therefore, plaintiffs of second Suit have not got any additional right under the will.

Be that as it may, once it is clear that both the parties have relied on individual documents executed by Smt. Basanti Devi treating property of her own, heavy onus lies upon persons who pleaded that the property did not

belong to Basanti Devi of her own, but, was a joint family property.

In India and particularly among Hindus, the family bonds are not only very strong but they have given right to a society who believe in a joint family going to the extent of even the concept of village community. In the concept of property, there have been three layers, i.e., Patriarchal Family, Joint Family and Village Community. The patriarchal family is headed by father and consists of his offsprings. The joint family may include within itself the members, related to each other, though not having common ancestors and goes beyond the family flowing from father himself. It is said that unlike England, where the concept of ownership, as a rule, is single, independent and unrestricted, and it may be joint, but the presumption is to the contrary. It may be restricted but only in special instances and under special provisions. The situations in India is totally different. Here the joint ownership is normally the rule and may be presumed to succeed until contrary is proved. If an individual holds property in severalty, in the next generation, it will relapse into a stand of joint-tenancy. A Hindu may start with nothing and make a self acquired fortune by dint of his own labour, capacity and merits and he is the absolute owner of estate but in a couple of generations his offspring would ramify in a joint family, like a banian tree which also stands as a single shoot. If the property is free from hands of its acquirer, it will become fettered in the hands of his heirs.

The "patriarchal family" may be defined as a group of natural or adoptive descendants, held together by subjection to the eldest living ascendant, father, grand-father, great-grandfather. Whatever be a formal prescription of law, the head of such a group is always in practice, despotic; and he is the object of respect, if not always of affection, which is probably seated deeper than any positive institution. Manu says, "three persons, a wife, a son and a slave, are declared by law to have in general no wealth exclusively their own; the wealth which they may earn is regularly acquired for the man to whom they belong." Narada says, "he is of age and independent, in case his parents be dead; during their lifetime he is dependent, even though he be grown old."

The "joint family" is normally a transition form from "patriarchal family" at the death of common ancestors or head of house. If the family chose to continue united, the eldest son would be the natural head. The former one was head of family by natural authority, the later other can only be so by a delegated authority. He is primus but inter pares. An undivided Hindu family thus is ordinarily joined not only in estate but in food and worship. The presumption, therefore, is that members of a Hindu family are living in a state of union unless contrary is established. This presumption however varies inasmuch as it is stronger in case of real brother than in case of cousin and

farther one go, from the founder of family, the presumption becomes weaker and weaker. However, there is no presumption that a family, because it is joint, possesses joint property. Under Mitakshara Law, possession of property is not necessary requisite for constitution of a joint family, though where persons live together, joint in food and worship, it is difficult to conceive of their possessing no property whatever, such as ordinary household articles which they would enjoy in common.

The intention to break joint family by effecting partition in respect of joint family property has always been considered with great respect, where amicably and peacefully, intacting love and affection, the members of joint family have settled their rights mutually. It can be given effect, orally, as also in writing.

In *Appovier v. Ramasubba Aiyar* (1866) 11 MIA 75 Lord Westbury took a view that the partition covers both, a division of right and a division of property. This is also reiterated in *Girja Bai v. Sadashiv Dhundiraj* (1916) 43 IA 151. When the members of undivided family agreed amongst themselves either with respect to a particular property or with reference to entire joint estate that it shall thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with; and in the estate, each member has thenceforth a definite and certain share which he may claim the right to receive and to enjoy in severalty although the property itself has not been actually severed and divided.

In *Raghubir v. Moti* (1913) 35 All 41 PC and *Anurago Kuer v. Darshan Raut*, AIR 1938 PC 65 the partition by agreement was explained by observing, that, if there be a conversion of joint-tenancy of an undivided family into a tenancy of common of the members of that undivided family, the undivided family becomes a divided family with reference to the property, i.e., the subject to agreement and that is a separation in interest and in right, although not immediately followed by a de facto actual division of subject matter. This may, at any time, be claimed by virtue of the separate right. This was also held so in *Amrit Rao v. Mukundrao* (1919) 15 Nag LR 165 PC.

The "family arrangements" also stand and enjoy same status. It is an agreement arrived by members of family, either by compromise doubtful or disputed rights, or by preserving a family property or by avoiding litigation for the peace and security of family or saving its honour. A severance of joint status may result, not only from an agreement between the parties but from any act or transaction which has the effect of defining their shares in the estate

though it may not partition the estate. Among all the coparceners, now it has been held, that, an agreement between all of them is not essential so as to result in disruption of joint status though it is required for the actual division and distribution of property, held jointly. A definite and unambiguous indication of intention by one member to separate himself from family and to enjoy his share in severalty will amount to a division in status. (See, *Ram Narain Sahu v. Musammat Makhana ILR (1939) All. 680 (PC)* and *Puttrangamma and Ors., v. M.S. Ranganna and Ors. AIR 1968 SC 1018*).

Further whenever there is a partition, the presumption is that it was a complete one both as to parties and property. There is no presumption that any property was excluded from partition. On the contrary, it has been held that burden lies upon him who alleges such exclusion to establish his assertion.

Now in the light of above general count of joint family, the matter need be examined whether it would apply to the case in hand.

There is no pleading on the part of defendants of Ist Suit that Smt. Basanti Devi had no 'Stridhan'. No material has come on record that she did not possess adequate wealth to purchase the property in dispute, herself. The will in question, it is sought to be explained that it was executed to avoid any future complication and thus, it suggests, that it is more of a compromise deal between the parties to avoid any future dispute. I am of the opinion that if it would have been a settlement for family arrangement, one would have gone to have it instead of a will. Ordinarily, a person executes a will in respect of the property owned by himself/herself. If one intends to show otherwise, heavy onus lie upon him to show that. The defendants of the Ist Suit are also claiming their rights under the will, which is fortified from their case set up in the IInd Suit. That being so, there was no occasion for lower appellate court to hold that the executor of will made the same in respect of a property which did not belong to her though no evidence adduced to hold it. Moreover, while holding that it was a joint family property, again the Court has relied on conjectures than evidence. This presumption on the part of lower appellate court, infact has made a new case, though it was never pleaded. Rather, I find that the case set up by defendants in both the suits was contradictory. Therefore, heavy onus lies upon them to prove such fact. The person who pleaded a fact, has to prove it by adducing evidence. The lower appellate court has placed a negative burden upon plaintiff in Ist Suit, in respect of a fact pleaded by other and that too, in contradiction to their stand in IInd Suit.

I find that lower appellate court has seen this question from reverse angle which is not a correct approach in the matter. Unless it is proved that property constituted a part of Joint Hindu Family Property, there was no question to shift onus on the other side to prove otherwise.

In this regard Lower Appellate court has categorically observed that it has not been stated anywhere in the plaint of first suit as to wherefrom Basanti Devi had income so as to acquire disputed property as herself acquired property. In the plaint of second suit it was pleaded that disputed property was a joint property though purchased in the name of Smt. Basanti Devi and was entered into in the name of Basanti Devi sometime in 1960 while five sons of Bhagelu separated in 1971 which shows that family was joint till 1971. Unfortunately, Lower Appellate Court, has not referred to any evidence to show that property was purchased from the income of joint family and was not self acquired property of Smt. Basanti Devi. In the present case it was not a property of a Hindu male head of the family, which would have become a subject matter of Joint Hindu family property with the birth of male child/children but here property admittedly belonged to Smt. Basanti Devi.

Those who pleaded otherwise to dispute her individual right thereon were under an obligation to adduce evidence and prove otherwise. There is no presumption at all that property of Hindu female would be a joint stock family property unless proved otherwise. The Lower Appellate Court, however, has proceeded as if it was incumbent upon the person who pleads that the property was self acquired property of Smt. Basanti Devi to prove, despite the fact that for decades together, i.e. from 1960 and onwards, admittedly property was in the name of Smt. Basanti Devi and after her death in 1990, on the basis of alleged Will, executed by her, treating it to be her own self acquired property, names of plaintiffs of second suit were substituted. Meaning thereby, they were also claiming rights on the property of Basanti Devi treating it to have succeeded thereupon pursuant to a Will which she allegedly had executed and which fact would have been possible only if property is self acquired by Basanti Devi.

In fact the conduct of plaintiff of second suit, from the very beginning was inconsistent and self contradictory. They treated disputed property as that belonging to Basanti Devi as her own property and not a part and parcel of joint property, hence succeeded by them i.e. plaintiffs of second suit only by virtue of Will executed by her and not by intestate succession. But when contested, gift deed, set up by plaintiff - Ist Suit, they took a new stand that the property was joint family property and did not belong to Smt. Basanti Devi, of her own. That being so, when they pleaded otherwise, onus lay upon them to prove, failing which, they had to fail. In my view, Lower Appellate Court has committed a patent error of law in reversing findings of Trial Court by holding that property in dispute was not owned by Smt. Basanti Devi, but was a joint family property and Benami of Smt. Basanti Devi. The Lower Appellate Court has misconstrued and misplaced burden of proof hence committed error by reaching a totally perverse and misplaced conclusion. These issues are accordingly answered against appellants and in favour of plaintiffs of first suit and defendant no.2 of second suit i.e. appellant in second appeal no.505 of 2001.

Issues no. 1 and 3 are therefore, answered in favour of plaintiff of suit no. 1 and defendants of suit no. 2.

Now, I come to Second issue. This court in *Kalawati v. Board of Revenue 1989 ALJ 316* has held that registration of a Gift Deed after death of the executor is patently illegal and would confer no right upon the beneficiary. In paragraph 15 of the judgment Court has said:-

“The date of the gift deed is 28.3.1972. One month later the petitioner kalawati died and after about a fortnight the gift deed as produced

before this Court suggests that it was registered on 16.5.1972. Could it be registered? The answer to this lies under the Registration Act, 1908. Under Section 34 of the Registration Act, aforesaid, no document shall be registered unless the person executing the document appears before the registering authority. A dispensation is given to the person executing the document that he or she may appoint an agent or a representative and an assignee for carrying out the purpose of registration. No agent had been appointed on behalf of Kalawati. She never appeared before the registering officer. There can be no issue on this as registration was after her death. The gift deed then becomes suspicious. Section 35 implies that if the person who executed the document is dead, the registering officer shall refuse to register the document. In the present case the person who executed the document, Kalawati died."

No other authority has been placed before the Court, wherein any view otherwise has been taken. I find no reason not to follow the above view. The question no. 2 therefore, is answered against plaintiff of suit no. 1 i.e. defendant no. 1 of suit no. 2, and in favour of defendants of suit no. 1 and plaintiffs of suit no. 2.

Now I come to the last i.e. question no. 4.

The mere fact that Will is registered will make no difference since under law, 'Will' is not compulsorily registrable instrument. 'Will' has to be proved by satisfying the requirement of Section 63 of Act, 1925.

In the context of 'Will', particularly when it was a registered document, though not compulsorily registrable under the statute, the Privy Council in *Gopal Das and another v. Tri Thakurji and others*, AIR 1943 PC 83, referring to Section 60 of Registration Act, 1908 (hereinafter referred to as the "Act, 1908") and Section 63 of Act, 1925, said, that even if endorsement of Registrar made under Section 60(2) of Act, 1908 is proved, it remains to be shown that the person admitting execution before Registrar was the same person, i.e., the executor. The registration of 'Will' does not create any presumption of its genuineness, which is to be proved independently and statement of the Registrar is only a piece of evidence which is to be assessed to judge how far it proves that the execution of 'Will' is in accordance with Section 63 of Act, 1925. This view has been referred to and reiterated in *Karri Nookaraju v. Putra Venkatarao and others*, AIR 1974 AP 13; *Labh Singh and others v. Piara Singh*, AIR 1984 P&H 270; and, *Baru Ram and others v. Smt. Kishani Devi*, 1993(1) Shim.L.C. 80.

The Apex Court had the occasion to look into this aspect in *H.*

*Venkatachala Iyengar v. B.N. Thimmajamma*, AIR 1959 SC 443 and said that one of the important features which distinguishes 'Will' from other documents is that the 'Will' speaks from the date of death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his 'Will' or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last 'Will' and testament of the departed testator. The Court thus held, the propounder of 'Will' must prove, (1) that the 'Will' was signed by testator in a sound and disposing state of mind duly understanding the nature and effect of disposition and he put his signature on the document of his own free will; (2) when the evidence adduced in support of the 'Will' is disinterested, satisfactory and sufficient to prove the sound and disposing state of testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of propounder; and, (3) if a 'Will' is challenged as surrounded by suspicious circumstances, all such legitimate doubts have to be removed by cogent, satisfactory and sufficient evidence to dispel suspicion. The Court said that onus on the propounder can be taken to be discharged on proof of the essential facts indicated therein.

In *Bhagwan Kaur v. Kartar Kaur*, 1994 SCC (5) 135 it was observed that decision on due execution of will, strictly speaking, is not primarily arriving at a finding of fact, as it has an admixture of law due to the specific requirements of Section 63 of Act, 1925 towards due execution. A method is provided in which a 'Will' shall be duly executed, i.e., it shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the 'Will' or has seen some other person sign the 'Will', in the presence and on direction of testator, or has received from the testator, a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the 'Will' in presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of the attestation shall be necessary. In the matter of proof of a 'Will' Section 68 of Act, 1872 enjoins that a document, if required by law to be attested, shall not be used as evidence until one attesting witness has been called for the purpose proving its execution.

Then again the matter came to be considered in *Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao and others*, AIR 2007 SC 614 and the Court said:

“The burden of proof that the Will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the Will and that he had put his signature out of his own free will having a sound disposition of

mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of Will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. (See *Madhukar D. Shende v. Tarabai Shedage* 2002(1) SCR 132 and *Sridevi and others v. Jayaraja Shetty and others*, AIR 2005 SC 780). Subject to above, proof of will does not ordinarily differ from that of proving any other document."

In *Bharpur Singh and others v. Shamsher Singh*, AIR 2009 SC 1766 it was held that a Will must be proved in terms of provisions of Section 63(c) of Act, 1925. Unlike other documents the Court also must satisfy its conscience before it passes an order holding a Will genuine and valid. Even animus attestandi is necessary ingredient for proving the attestation. If a Will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and defendant. An adversarial proceeding in such cases becomes a matter of Court's conscience and propounder of the Will has to remove all suspicious circumstances to satisfy that Will was duly executed by testator wherefore cogent and convincing explanation in respect of suspicious circumstances shrouding the making of 'Will' must be offered.

In the present case one out of two witnesses to Will has been examined but he himself admits that he has not seen executor of Will who signed the same. He has also not proved signature of another witness. The Will in question therefore, admittedly has not been proved in accordance with the procedure prescribed in law.

Thus question no. 4 is answered against plaintiff of second suit.

In view of above, it cannot be doubted that neither there existed a valid gift deed which would confer any right upon the plaintiff - Ist Suit, nor any valid will existed which would confer any right in favour of the plaintiff - IInd Suit. Property in question therefore would stand devolved, after death of Smt. Basanti Devi, in accordance with rules of Succession applicable to parties in these matters. Both the suits therefore stand dismissed, subject to rights derived by the parties by way of succession, in accordance with applicable law, after the death of Smt. Basanti Devi.

The judgments of the Courts below, taking another view, are set aside,

accordingly. Both appeals are decided in the manner as above. [**Champa Devi v. Rama and Others, 2014(3) ARC 354**]

**Section 100 of Civil Procedure Code, 1908 – Second Appeal – Interference into questions of fact**

It is well settled by a long series of decisions of the judicial committee of the Privy Council and of this Court that a High Court on second appeal, cannot go into questions of fact, however, erroneous the findings of fact recorded by the Courts of fact may be. It is not necessary to cite those decisions. Indeed, the learned counsel for the plaintiff-appellant did not and could not contend that the High Court was competent to go behind the finding of fact concurrently recorded by the two courts of fact. [**Daulat Singh v. Moradabad Development Authority, Moradabad, 2014(3) ARC 487**]

**Section 100 C.P.C. 1908: Second Appeal –Rejection of Second Appeal on the ground that no substantial question of law was arising was held not proper**

The High Court though recorded the submissions made by the counsel on both sides, have not dealt with the same in proper perspective in the impugned judgment. Of course the recent decision of this Court was not available to the High Court at the time of disposal of the second appeal. However, the rejection of the same on the ground of having no substantial question of law arising for considera

tion, in our view is not proper and the judgment is liable to be set aside. Without expressing any opinion on the merits of the contentions raised, we deem it fit to remit the matter to the High Court for fresh consideration. [**Sau Shaila Balasaheb Kadam v. Balasaheb Hindu Rao Kadam, 2014(32) LCD 2486**]

**Section 152– Amendment of judgments, decrees or order. Since there is clear finding of shares of the parties in decree and as such by clarifying the shares in the property no mistake of law has been committed. An unintentional mistake of the Court which may prejudice cause of any party must be rectified.**

**Order II Rule 2(3) of CPC, 1908– Plea of the bar. Section 55 of the Indian Contract Act, 1872 - Article 54 of the Limitation Act 1963 – Is time essence of Contract?**

Coming first to the legal question as to whether bar contained in Order

II Rule 2 of CPC is attracted so as to non suit the plaintiff from filing the suit for specific performance of the agreement, in our considered opinion, the bar is not attracted. At the outset, we consider it apposite to take note of law laid down by the Constitution bench of this Court in *Gurbux Singh v. Bhooralal*, AIR 1964 SC 1810, wherein this Court while explaining the true scope of Order II Rule 2 of CPC laid down the parameters as to how and in what circumstances, a plea should be invoked against the plaintiff. Justice Ayyangar speaking for the Bench held as under:

“In order that a plea of a bar under Order 2 Rule 2(3) of the Civil Procedure Code should succeed the defendant who raises the plea must make out (1) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (2) that in respect of that cause of action the plaintiff was entitled to more than one relief; (3) that being thus entitled to more than one relief the plaintiff, without leave obtained from the Court omitted to sue for the relief for which the second suit had been filed. From this analysis it would be seen that the defendant would have to establish primarily and to start with, the precise cause of action upon which the previous suit was filed, for unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar.....”

This takes us to the next question as to whether suit for specific performance was barred by limitation prescribed under Article 54 of the Limitation Act?

In order to examine this question, it is necessary to first see the law on the issue as to whether time can be the essence for performance of an agreement to sell the immovable property and if so whether plaintiff in this case performed her part within the time so stipulated in the agreement?

The learned Judge J.C. Shah (as His Lordship then was), speaking for the Bench examined this issue in *Gomathinayagam Pillai and Ors. v. Pallaniswami Nadar*, AIR 1967 SC 868, in the light of English authorities and Section 55 of the Contract Act and held as under:

“It is not merely because of specification of time at or before which the thing to be done under the contract is promised to be done and default in compliance therewith, that the other party may avoid the contract. Such an option arises only if it is intended by the parties that time is of the essence of the contract. Intention to make time of the essence, if expressed in writing, must be in language which is unmistakable :

It may also be inferred from the nature of the property agreed to be sold, conduct of the parties and the surrounding circumstances at or before the contract. Specific performance of a contract will ordinarily be granted, notwithstanding default in carrying out the contract within the specified period, if having regard to the express stipulations of the parties, nature of the property and the surrounding circumstances, it is not inequitable to grant the relief. If the contract relates to sale of immovable property, it would normally be presumed that time was not of the essence of the contract. Mere incorporation in the written agreement of a clause imposing penalty in case of default does not by itself evidence an intention to make time of the essence. In *Jamshed Khodaram Irani v. Burjorji Dhunjibhai* I.L.R. 40 Bom. 289 the Judicial Committee of the Privy Council observed that the principle underlying S. 55 of the Contract Act did not differ from those which obtained under the law of England as regards contracts for sale of land. The Judicial Committee observed :

"Under that law

equity which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time.... Their Lordships are of opinion that this is the doctrine which the section of the Indian Statute adopts and embodies in reference to sales of land. It may be stated concisely in the language used by Lord Cairns in *Tilley v. Thomas* I.L.R. (1867) Ch. 61:-

‘The construction is, and must be, in equity the same as in a Court of law. A Court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps towards completion, if it can do justice between the parties, and if (as Lord Justice Turner said in *Roberts v. Berry* (1853) 3 De G.M. G. 284, there is nothing in the 'express stipulations between the parties, the nature of the property, or the surrounding circumstances,' which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract. Of the three grounds... mentioned by Lord Justice Turner 'express stipulations' requires no comment. The 'nature of the property'

is illustrated by the case of reversions, mines, or trades. The 'surrounding circumstances' must depend on the facts of each particular case."

In *Govind Prasad Chaturvedi v. Hari Dutt Shastri and Anr.*, (1977) 2 SCC 539, this Court placing reliance on the law laid down in *Gomathinayagam Pillai (supra)*, reiterated the aforesaid principle and held as under:

“.....It may also be mentioned that the language used in the agreement is not such as to indicate in unmistakable terms that the time is of the essence of the contract. The intention to treat time as the essence of the contract may be evidenced by circumstances which are sufficiently strong to displace the normal presumption that in a contract of sale of land stipulation as to time is not the essence of the contract.

Apart from the normal presumption that in the case of an agreement of sale of immovable property time is not the essence of the contract and the fact that the terms of the agreement do not unmistakably state that the time was understood to be the essence of the contract neither in the pleadings nor during the trial the respondents contended that time was of the essence of the contract.”

Again in the case reported in *Smt. Chand Rani vs. Smt. Kamal Rani*, (1993) 1 SCC 519, this Court placing reliance on law laid down in aforementioned two cases took the same view. Similar view was taken with more elaboration on the issue in *K.S. Vidyadnam and Ors. v. Vairavan*, (1997) 3 SCC 1, wherein it was held as under:

“It has been consistently held by the courts in India, following certain early English decisions, that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract unless specifically provided to that effect. The period of limitation prescribed by the Limitation Act for filing a suit is three years. From these two circumstances, it does not follow that any and every suit for specific performance of the agreement (which does not provide specifically that time is of the essence of the contract) should be decreed provided it is filed within the period of limitation notwithstanding the time-limits stipulated in the agreement for doing one or the other thing by one or the other party. That would amount to saying that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. Would it be reasonable to say that because time is not made the essence of the contract, the time-limit (s) specified in the agreement have no relevance and can be ignored with impunity?

It would also mean denying the discretion vested in the court by both Sections 10 and 20. As held by a Constitution Bench of this Court in *Chand Rani vs. Kamal Rani (1993) 1 SCC 519*:

“....it is clear that in the case of sale of immovable property there is no presumption as to time being the essence of the contract. Even if it is not of the essence of the contract, the Court may infer that it is to be performed in a reasonable time if the conditions are (evident?) : (1) from the express terms of the contract; (2) from the nature of the property; and (3) from the surrounding circumstances, for example, the object of making the contract.”

In other words, the court should look at all the relevant circumstances including the time-limit(s) specified in the agreement and determine whether its discretion to grant specific performance should be exercised. Now in the case of urban properties in India, it is well-known that their prices have been going up sharply over the last few decades - particularly after 1973.

“.....Indeed, we are inclined to think that the rigor of the rule evolved by courts that time is not of the essence of the contract in the case of immovable properties - evolved in times when prices and values were stable and inflation was unknown - requires to be relaxed, if not modified, particularly in the case of urban immovable properties. It is high time, we do so.....”

The aforesaid view was upheld in *K. Narendra vs. Riviera Apartments (P) Ltd. (1999) 5 SCC 77*.

Applying the aforesaid principle of law laid down by this Court to the facts of the case at hand, we have no hesitation in holding that the time was not the essence of agreement for its performance and the parties too did not intend that it should be so.

Clauses 2 and 3 of the agreement (Annexure P-1), which are relevant to decide this question reads as under:

“2. The purchaser shall pay a sum of Rs.50,000/- (Rupees Fifty Thousand only) as advance to the seller at the time of signing this agreement, the receipt of which the seller hereby acknowledges and the balance sale consideration amount shall be paid within 60 days from the date of expiry of lease period.

3. The Seller covenants with the Purchaser that efforts will be made with the Bangalore Development Authority for the transfer of the schedule property in favour of the Purchaser after paying penalty. In case it is not possible then the

time stipulated herein for the balance payment and completion of the sale transaction will be agreed mutually between the parties.”

Reading both the clauses together, it is clear that time to perform the agreement was not made an essence of contract by the parties because even after making balance payment after the expiry of lease period, which was to expire in 1995, defendant no. 2 as owner had to make efforts to transfer the land in the name of plaintiff. That apart, we do not find any specific clause in the agreement, which provided for completion of its execution on or before any specific date.

Since it was the case of the plaintiff that she paid the entire sale consideration to defendant no. 2 and was accordingly placed in possession of the suit house, the threat of her dispossession in 2000 from the suit house coupled with the fact that she having come to know that defendant no. 2 was trying to alienate the suit house, gave her a cause of action to serve legal notice to defendant no. 2 on 6.3.2000 calling upon defendant no. 2 to perform her part and convey the title in the suit house by executing the sale deed in her favour. Since defendant no. 2 failed to convey the title, the plaintiff filed a suit on 31.3.2000 for specific performance of the agreement.

Article 54 of the Limitation Act which prescribes the period of limitation for filing suit for specific performance reads as under:

54. For specific performance of a contract.

Three years The date of fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

Mere reading of Article 54 of the Limitation Act would show that if the date is fixed for performance of the agreement, then non-compliance of the agreement on the date would give a cause of action to file suit for specific performance within three years from the date so fixed. However, when no such date is fixed, limitation of three years to file a suit for specific performance would begin when the plaintiff has noticed that the defendant has refused the performance of the agreement.

In our considered opinion, the High Court being the last Court of appeal on facts /law while hearing first appeal under Section 96 of CPC was well within its powers to appreciate the evidence and came to its own conclusion independent to that of the trial court's decision. One can not dispute the legal proposition that the grant/refusal of specific performance is a discretionary relief, and, therefore, once it is granted by the appellate court on appreciation of evidence, keeping in view the legal principle applicable for the grant then

further appellate court should be slow to interfere in such finding, unless the finding is found to be either against the settled principle of law, or is arbitrary or perverse.

Though this litigation is not between inter se owner and subsequent purchaser of the suit house yet in order to do substantial justice between the parties and to see the end of this long litigation and to prevent a fresh suit being instituted by defendant no.1 against defendant no.2 for refund of sale consideration which will again take years to decide and lastly when neither it involve any intricate adjudication of facts, nor it is going to cause any prejudice to the parties, we consider it just and proper to invoke our power under Article 142 of the Constitution of India in the peculiar facts and circumstances of the case as narrated above and accordingly direct defendant no. 2 (owner of the suit house) to refund Rs. 4 lacs to defendant no. 1 within three months after execution of sale deed by them in favour of plaintiff pursuant to the impugned judgment/decree. [**Rathnavathi v. Kavita Ganashamdas, 2014(32) LCD 2260**]

**Order VI, Rule 17 of Civil Procedure Code, 1908– Amendment of written statement.**

The amendment of paragraph 5 and 6 sought to be made, denied the partition as well as half share between the parties and accordingly additional pleas was also sought to be amended. The revisional court after considering the amendments proposed to be made came to the conclusion that categorical admissions made in respect of partition as well as half share was a complete resile of admission and a new case has been set up, the amendment could not be said to be an explanation of the admissions made earlier and is not an alternative plea, if such an amendment is allowed the respondents/plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. The amendment does not appear to be bonafide as partition of the suit property had taken place before the Zamindari abolition and possession of respective share of the suit property has continued as such; under the garb of the amendment petitioner seeks a re-partition of the property.

The Court does not find any illegality or jurisdictional error exercised by the revisional court in disallowing the amendment of the written statement. The writ petition is, accordingly, dismissed. No order as to costs. [**Anand Kumar v. Prem Chandra, 2014(3) ARC 490**]

**Order VII, Rule 11 and Sections 24(5) and 151 of Civil Procedure Code, 1908 – Section 134 of the Trade Marks Act, 1999 – Suit by plaintiff respondent for a declaration and permanent injunction. In view of facts and circumstances, as well as cited decisions in this regard it was held that**

**impugned order passed by Court below was justified and hence affirmed  
Revision dismissed.**

It is also worthwhile to note that the provision of Section 24(5) C.P.C. was inserted by Act no. 104 of 1976 w.e.f. 1.2.1977. Therefore, the law laid down in the case of *Raja Setrucharlu Ramabhadra Raju Bahadur and others v. Maharaja of Jeypore and others : AIR 1919 Privy Council 150*, (which was decided in the year 1919) as relied upon by the learned counsel for the revisionists, has no relevancy to the facts of the present case particularly in view of the insertion of Section 24(5) in the Code of civil procedure vide Act No. 104 of 1976 w.e.f. 1.2.1977.

It is also worthwhile to mention here that Section 24 (5) Code of Civil Procedure specifically provides the power to the superior court to transfer the case from a court which has no jurisdiction to the competent court. If instead of adopting the procedure provided under order VII Rule 10 C.P.C. , one of the parties in the suit invokes the statutory remedy as provided under section 24 (5) C.P.C. , it makes no difference as it is only a technicality which cannot come into the way of deciding the trial by the competent court having its jurisdiction.

In the present case, admittedly, the trial is pending before the trial court i.e. Addl. District Judge which is the competent court to try the suit and if the prayer of the revisionists is allowed for return of the plaint, the suit in question would again be presented before the same court of the Addl. District Judge, Gautam Buddha Nagar where the suit in question is already pending for disposal, therefore, it would lead to ridiculous situation if the prayer of the revisionist is allowed. Thus, I do not find any infirmity in the impugned order warranting an interference by this court in exercise of revisional powers under section 115 of the Code of Civil Procedure. The impugned order, in my opinion, does not suffer from any error of law or jurisdiction. [**Cupid Condoms Limited (M/s) v. M/s Health Care Products, 2014(3) ARC 682**]

**Order VIII Rule 1 and 10 – Written Statement. It was held that the provisions of Order VIII Rules 1 and 10 are directory in nature as such the written statement filed should have been accepted and considered by the trial court, taking a lenient view.**

**Order VIII Rule 10 – Scope.– The Trial Court passed ex-parte decree mentioning therein that defendant is absent and plaintiff proved its case but no reasons assigned nor any discussion about the ex-parte evidences led and materials available on record made while passing ex-parte decree. It was held that impugned judgment cannot be sustained as even an ex-parte judgment should satisfy the description of the judgment as laid down in Order 20 Rule 4**

**CPC. It was further held that the Court is under obligation to apply its mind to whatever ex-parte evidence or affidavit available on the record of the case which must be writ large on the face of record – Impugned order set aside – First appeal allowed.**

Under the old rule as it stood before amendments in 1999 and 2002, the defendant was required to file his written statement at or before the first hearing or within such time as the Court may permit. But Rule 1 in its present form has fixed a time limit within which written statement has to be filed. However, considering the amendments in C.P.C. by Amendments Act 2002, the Apex Court in various judgements in *Salem Advocate Bar Association, Tamil Nadu v. Union of India*, AIR 2005 SC 3353, has held that these rules are not mandatory but directory. In another case, *Rani Kusum v. Kanchan Devi*, AIR 2005 SC 3304, the Hon'ble Supreme Court has again held the same. While dealing this proviso in Salem Advocate Case, the Court has held as under (paras 21 & 22):

“21. The use of the word ‘shall’ in Order VIII, Rule 1 by itself is not conclusive to determine whether the provision is mandatory or directory. We have to ascertain the object which is required to be served by this provision and its design and context in which it is enacted. The use of the word ‘shall’ is ordinarily indicative of mandatory nature of the provision but having regard to the context in which it is used or having regard to the intention of the legislation, the same can be construed as directory. The rule in question has to advance the cause of justice and not to defeat it. The rules of procedure are made to advance the cause of justice and not to defeat it. Construction of the rule or procedure which promotes justice and prevents miscarriage has to be preferred. The rule of procedure are handmaid of justice and not its mistress. In the present context, the strict interpretation would defeat justice.

22. In construing this provision, support can also be had from Order VIII Rule 10 which provides that where any party from whom a written statement is required under Rule 1 or Rule 9, fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce judgment against him, or make such other order in relation to the suit as it thinks fit. On failure to file written statement under this provision, the Court has been given the discretion either to pronounce judgment against the defendant or make such other order in relation to the suit as it thinks fit. In the context of the provision, despite use of the word ‘shall’ the Court has been given the discretion to pronounce or not to pronounce the judgment against the defendant even if written

statement is not filed and instead pass such order as it may think fit in relation to the suit.”

In another case of *Rani Kusum (supra)*, the Apex Court observed as under:

“Order VIII, Rule 1 after the amendment casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the court to take the written statement on record though filed beyond the time as provided for. Further, the nature of the provision contained in Order VIII, Rule 1 is procedural. It is not a part of the substantive law. Substituted Order VIII, Rule 1 intends to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases causing inconvenience to the plaintiffs and petitioners approaching the court for quick relief and also to the serious inconvenience of the court faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. While justice delayed may amount to justice denied, justice hurried may in some cases amount to justice buried.

Order 8 Rule 10 provides a condition where the party fails to file written statement called for by the Court then the Court may pronounce judgement against him. The said provision is also held to be directory and in the case of *Shantilal Gulabchand Mutha v. Tata Engineering and Locomotive Company Limited and another*, (2013)4 SCC 396 relied upon by the appellants. The Apex Court has held that the relief under Order 8 Rule 10 C.P.C. is also discretionary and Court has to be more cautious while exercising such power where the defendant fails to file the written statement. Even in such circumstances, the Court must be satisfied that there is no fact which needs to be proved in spite of deemed admission by the defendant and the Court must give reasons for passing such judgment.

So far as the merit of this case in concerned, the court has proceeded ex-parte against the defendants and in all attempt by the defendants to file written statement alongwith application, was disallowed by the trial court and further the defendants were also prevented from even cross examining the witnesses. An application to set aside the ex-parte decree was also rejected by the Trial Court. The principle of natural justice has also observed that a person should not be condemned unheard and opportunity should be afforded to the defendants to contest the case on merit. Since the order passed by the trial court is an ex-parte

order and the Court has left no option to set aside the judgment and remand the case for deciding it afresh on merits in accordance with law after giving full opportunity to the defendants- appellants to file written statement. Since the Court has simply remanded the case de-novo there is no occasion to the Court to make any observation on merit of the case.

In view of the above, the appeal deserves to be allowed and the order dated 17-02-2011 passed by the Civil Judge (Senior Division), Azamgarh in Original Suit No. 61 of 2000 is set aside and the matter is remanded back to the trial court for deciding afresh in accordance with law after giving full opportunity to the defendants-appellants to file written statement. [**Khadi Evam Gramodyog Board Lko.. v. M/s Purvanchal Janta Gram Sewa Sansthan, 2014(32) LCD 2225**]

**Order 8 Rule 6-A of CPC – Counter-claim –Trial court rejected the cunter-claim filed contrary to the principles of Order 2 Rule 2 CPC as not being raised in earlier suit. Revision is not maintainable as the order passed by the learned Trial Judge has the status of a decree. It was further held that when an opinion is expressed holding that the counter-claim is barred by principles of Order 2 Rule 2 CPC, it indisputably adjudicates the controversy as regards the substantive rights of the defendants who had lodged the counter-claim. Civil Appeal allowed. (1996) 4 SCC 699, AIR 1967 SC 1344, AIR 1961 SC 7794 ref.**

“Once the matter in controversy has received judicial determination, the suit results in a decree either in favour of the plaintiff or in favour of the defendant.” When there is a conclusive determination of rights of parties upon adjudication, the said decision in certain circumstances can have the status of a decree. In the instant case, the counter-claim has been adjudicated and decided on merits holding that it is barred by principle of Order 2, Rule 2 of C.P.C. The claim of the defendants has been negated. [In Jag Mohan Chawla and Another v. Dera Radha Swami Satsang and Others, \(1996\)4 SCC 699](#) dealing with the concept of counter-claim, the Court has opined thus:-

“... is treated as a cross-suit with all the indicia of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite court fee thereon. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protection (sic protraction), the legislature intended to try both the suit and the counter-claim in the same suit as suit and cross-suit and have them disposed of in the same trial. In other words, a defendant can

claim any right by way of a counter-claim in respect of any cause of action that has accrued to him even though it is independent of the cause of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit.”

Keeping in mind the conceptual meaning given to the counter-claim and the definitive character assigned to it, there can be no shadow of doubt that when the counter-claim filed by the defendants is adjudicated and dismissed, finality is attached to it as far as the controversy in respect of the claim put forth by the defendants is concerned. Nothing in that regard survives as far as the said defendants are concerned. If the definition of a decree is appropriately understood it conveys that there has to be a formal expression of an adjudication as far as that Court is concerned. The determination should conclusively put to rest the rights of the parties in that sphere. When an opinion is expressed holding that the counter-claim is barred by principles of Order 2, Rule 2 C.P.C., it indubitably adjudicates the controversy as regards the substantive right of the defendants who had lodged the counter-claim. It cannot be regarded as an ancillary or incidental finding recorded in the suit. In this context, we may fruitfully refer to a three-Judge Bench decision in [M/s. Ram Chand Spg. & Wvg. Mills v. M/s. Bijli Cotton Mills \(P\) Ltd., Hathras and Others](#), AIR 1967 SC 1344 wherein their Lordships was dealing with what constituted a final order to be a decree. The thrust of the controversy therein was that whether an order passed by the executing court setting aside an auction sale as a nullity is an appealable order or not. The Court referred to the decisions in [Jethanand and Sons v. State of Uttar Pradesh](#), AIR 1961 SC 794 and [Abdul Rahman v. D.K. Kassim and Sons](#), AIR 1933 PC 58 and proceeded to state as follows:-

“In deciding the question whether the order is a final order determining the rights of parties and, therefore, falling within the definition of a decree in Section 2(2), it would often become necessary to view it from the point of view of both the parties in the present case - the judgment-debtor and the auction-purchaser. So far as the judgment-debtor is concerned the order obviously does not finally decide his rights since a fresh sale is ordered. The position however, of the auction-purchaser is different. When an auction-purchaser is declared to be the highest bidder and the auction is declared to have been concluded certain rights accrue to him and he becomes entitled to conveyance of the property through the court on his paying the balance unless the sale is not confirmed by the court. Where an application is made to set aside the auction sale as a nullity, if the court sets it aside either by an order on

such an application or suo motu the only question arising in such a case as between him and the judgment-debtor is whether the auction was a nullity by reason of any violation of Order 21, Rule 84 or other similar mandatory provisions. If the court sets aside the auction sale there is an end of the matter and no further question remains to be decided so far as he and the judgment-debtor are concerned. Even though a resale in such a case is ordered such an order cannot be said to be an interlocutory order as the entire matter is finally disposed of. It is thus manifest that the order setting aside the auction sale amounts to a final decision relating to the rights of the parties in dispute in that particular civil proceeding, such a proceeding being one in which the rights and liabilities of the parties arising from the auction sale are in dispute and wherein they are finally determined by the court passing the order setting it aside. The parties in such a case are only the judgment-debtor and the auction-purchaser, the only issue between them for determination being whether the auction sale is liable to be set aside. There is an end of that matter when the court passes the order and that order is final as it finally, determines the rights and liabilities of the parties, viz., the judgment-debtor and the auction-purchaser in regard to that sale, as after that order nothing remains to be determined as between them.”

After so stating, the Court ruled that the order in question was a final order determining the rights of the parties and, therefore, fell within the definition of a decree under Section 2(2) read with Section 47 and was an appealable order.

We have referred to the aforesaid decisions to highlight that there may be situations where an order can get the status of a decree. A Court may draw up a formal decree or may not, but if by virtue of the order of the Court, the rights have finally been adjudicated, irrefutably it would assume the status of a decree. As is evincible, in the case at hand, the counter-claim which is in the nature of a cross-suit has been dismissed. Nothing else survives for the defendants who had filed the counter-claim. Therefore, we have no hesitation in holding that the order passed by the learned trial Judge has the status of a decree and the challenge to the same has to be made before the appropriate forum where appeal could lay by paying the requisite fee. It could not have been unsettled by the High Court in exercise of the power under Article 227 of the Constitution of India. Ergo, the order passed by the High Court is indefensible. [**Rajni Rani v. Khairati Lal, 2014(32) LCD 2533**]

**Order IX, Rule 9 and Order 11, Rule 2- Maintainability of suit –**

**Consideration of –For deciding maintainability of suit written statement or evidence is to be considered**

The order dated 22.10.2008 rejects the application of the petitioners (Paper No.27-Ga) whereby they have contended that the suit of the respondent No.4 (Original Suit No.255 of 2001) is not maintainable as his earlier Original Suit No.111 of 1995 to the same effect was dismissed in default.

The court of first instance rejected the above application holding that the cause of action in both the suits are distinct. The order has been affirmed in revision.

Counsel for the petitioner submits that suit is barred by order 9 Rule 9 C.P.C. as well as Order 2 Rule 2 C.P.C.

The argument of the petitioner that the suit is barred by Order 9 Rule 9 C.P.C. or Order 2 Rule 2 does not appear to be so barred on the simple reading of the plaint averments unless one falls upon the written statement or the other material on record. If for deciding the maintainability of the suit, written statement or the evidence is to be considered, then it is appropriate to frame an issue regarding the suit being so barred and permit the parties to adduce evidence on the issue instead of rejecting the plaint on a mere application. Such an exercise has not been undertaken. Therefore, the suit could not have been dismissed.

In view of the aforesaid facts and circumstances, the application of the petitioner (Paper No.27-Ga) has rightly been rejected by the courts below and the proper course open to the petitioner, if any, is to get an issue in that regard framed and decided on evidence .(**Smt. Dhanwanti and another v. State of U.P. and others 2014 (5) AWC 5439**)

**Order 20 Rule 18 of the CPC, 1908 – It has ben held that in the preliminary decree not only the rights of the plaintiff but rights and interests of others can also be declared.**

**Maxim referred – ‘actus curiae neminem gravabit’ means ‘an act of Court shall prejudice no man’**

Had the appellate court, not decreed the suit with discussion of evidence after rejecting the plea of the defendant No.12 as to his claim of ownership, and had the defendants 1 to 11 not pleaded for separation of their shares with admission of share of the plaintiff as decreed by the Appellate Court , it could have been said that the High Court erred in declaring shares of the plaintiff or the defendants by resorting to Section 152 of the Code. But in the present case since there is a clear finding of shares of the parties in the judgment and order

dated 25.1.1996, as such by clarifying the decree by the impugned order, in our opinion the High Court has committed no mistake of law. In this connection, we would like to re-produce sub-rule (2) of Rule 18 of Order XX of the Code, which reads as under:

**"18. Decree in suit for partition of property or separate possession of a share therein-** Where the Court passes a decree for the partition of property or for the separate possession of a share therein, then,-

xxx xxx xxx xxx

(2) if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties, interested in the property and giving such further directions as may be required".

Above quoted sub-rule clearly indicates that in the preliminary decree not only the right of the plaintiff but rights and interests of others can also be declared. At the end, we would also like to refer the case of *Shub Karan Bubna alias Shub Karan v. Sita Saran Bubna and Others* (2009) 9 SCC 689 wherein it is explained that "partition" is a redistribution or adjustment of pre-existing rights among co-owners/coparceners, resulting in a division of land or other properties jointly held by them into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty.

This Court has earlier also reiterated in *U.P.S.R.T.C. v. Imtiaz Hussain* (2006) 1 SCC 380 has reiterated that the basis of provision of Section 152 of the Code is found on the maxim 'actus curiae neminem gravabit' i.e. an act of Court shall prejudice no man. As such an unintentional mistake of the Court which may prejudice the cause of any party must be rectified. However, this does not mean that the Court is allowed to go into the merits of the case to alter or add to the terms of the original decree or to give a finding which does not exist in the body of the judgment sought to be corrected. [**Srihari (Dead) Through L.Rs. v. Syed Maqdoom Shah, 2014 (32) LCD 2509**]

### **Order 39 Rule 1 and 2**

In a suit for cancellation of Sale deed and permanent injunction, the plea was taken in the suit that the sons, grandsons and daughter in law of the plaintiff are well settled in U.S.A. with high income supporting the plaintiff who had no need to sell his property by the sale deed in question which was got executed by playing fraud and coercion but the Courts below refused to grant

interim injunction. The writ petition was disposed of finally directing status quo to be maintained till disposal of the suit, directed to be concluded within a maximum period of 18 months. [**Smt. Indrawati v. Shri Pati Mishra, 2014(32) LCD 2582 (All.)(L.B.)**]

**Order 39, Rule 1,2, and 3 of Civil Procedure Code, 1908 – Suit for permanent prohibitory injunction.**

The existence of the prima facie case alone does not entitle the applicant for temporary injunction. The applicant must further satisfy the court about the second condition by showing that he may suffer irreparable injury if the injunction as prayed is not granted, and that there is no other remedy open to him by which he can protect himself from the consequences of apprehended injury. The expression irreparable injury however does not mean that there should be no possibility of repairing the injury. It only means that the injury must be a material one, i.e., which cannot be adequately compensated by damages.

In the leading case of *American Cyanamid Co. v. Ethicon Ltd.* (1975)1 All.E.R. 504, the House of Lords has rightly pronounced the principle thus:

“the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant’s continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff’s claim appeared to be at that stage. If on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff’s undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason upon this ground to refuse an interlocutory injunction.”

The third condition of granting interim injunction is that the balance of convenience must be in favour of the applicant. In other words, the court must be satisfied that the comparative mischief, hardship or inconvenience which is likely to be caused to the applicant by refusing injunction will be greater than that which is likely to be caused to the opposite party by granting it. If on weighing conflicting probabilities, the court is of the opinion that the balance of convenience is in favour of the applicant, it would grant injunction, otherwise refuse to grant it.

In *Dalpat Kumar v. V.Prahlad Singh*, (1992) 1 SCC 719, the Supreme Court stated as follows:-

“The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject-matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit.”

In *United Commercial Bank v. Bank of India*, 1981(2) SCC 786, the Court observed : (para 50 and 51)

“50. No injunction could be granted under Order 39, Rules 1 and 2 of the Code unless the plaintiffs establish that they had a prima facie case, meaning thereby that there was a bona fide contention between the parties or a serious question to be tried. The question that must necessarily arise is whether in the facts and circumstances of the case, there is a prima facie case and, if so, as between whom? In view of the legal principles applicable, it is difficult for us to say on the material on record that the plaintiffs have a prima facie case. It cannot be disputed that if the suit were to be brought by the Bank of India, the High Court would not have granted any injunction as it was bound by the terms of the contract. What could not be done directly cannot be achieved indirectly in a suit brought by the plaintiffs.

51. Even if there was a serious question to be tried, the High Court had to consider the balance of convenience. We have no doubt that there is no reason to prevent the appellant from recalling the amount of Rs. 85,84,456. The fact remains that the payment of Rs. 36,52,960 against

the first lot of 20 documents made by the appellant to the Bank of India was a payment under reserve while that of Rs. 49,31,496 was also made under reserve as well as against the letter of guarantee or indemnity executed by it. A payment 'under reserve' is understood in banking transactions to mean that the recipient of money may not deem it as his own but must be prepared to return it on demand. The balance of convenience clearly lies in allowing the normal banking transactions to go forward. Furthermore, the plaintiffs have failed to establish that they would be put to an irreparable loss unless an interim injunction was granted."

[Refer : *Best Sellers Retail ( India) Pvt. Ltd. V. Aditya Birla Nuvo Ltd.*, (2012)6 SCC 792]

Experience shows that once injunction is granted it is a nightmare for the defendant in getting it vacated. The court should be very careful in granting injunction. Ex parte injunction should be granted in case of grave urgency, safe and better course is to give short notice to the other side.

Supreme Court in *Maria Margarida Sequeria Fernades and other v. Erasmo Jack de Sequeria*, (2012)5 SCC 370 : 2012(2) ARC 325, held as follows-

"83. Grant or refusal of an injunction in a civil suit is the most important stage in the civil trial. Due care, caution, diligence and attention must be bestowed by the judicial officers and judges while granting or refusing injunction. In most cases, the fate of the case is decided by grant or refusal of an injunction. Experience has shown that once an injunction is granted, getting it vacated would become a nightmare for the defendant.

84. In order to grant or refuse injunction, the judicial officer or the judge must carefully examine the entire pleadings and documents with utmost care and seriousness. The safe and better course is to give short notice on injunction application and pass an appropriate order after hearing both the sides. In case of grave urgency, if it becomes imperative to grant an ex-parte ad interim injunction, it should be granted for a specified period, such as, for two weeks. In those cases, the plaintiff will have no inherent interest in delaying disposal of injunction application after obtaining an ex-parte ad interim injunction."

In *Morgan Stanley Mutual Fund v. Kartick Das*, 1994(3) JT 654, the

Supreme Court indicated the factors which should weigh with the court in the grant of an ex parte injunction:

- "(a) whether irreparable or serious mischief will ensue to the plaintiff;
- (b) whether the refusal of ex parte injunction would involve greater injustice than the grant of it would involve;
- (c) the court will also consider the time at which the plaintiff first had notice of the act complained so that the making of improper order against a party in his absence is prevented;
- (d) the court will consider whether the plaintiff had acquiesced for sometime and in such circumstances it will not grant ex parte injunction;
- (e) the court would expect a party applying for ex parte injunction to show utmost good faith in making the application.
- (f) even if granted, the ex parte injunction would be for a limited period of time.
- (g) General principles like prima facie case balance of convenience and irreparable loss would also be considered by the court."

The court must weigh one need against another and determine where 'the balance of convenience' lies.

The same principles/considerations apply to the defendant seeking vacation of injunction order. In *Gujarat Bottling Co. Ltd. v. Coca Cola Co.*<sup>15</sup>, the Supreme while rejecting the defendant's application for vacating the interim relief held as follows:-

"Under Order 39 of the Code of Civil Procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest. These considerations will arise not only in respect of the person who seeks an order of injunction under order 39 Rule 1 or Rule 2 of the Code of Civil

Procedure, but also in respect of the party approaching the Court for vacating the ad-interim or temporary injunction order already granted in the pending suit or proceedings."

Rule 1 of Order 39, nowhere provides that no temporary injunction can be granted by the court unless the case falls within the circumstances enumerated therein, where the case is not covered by Order 39, interim injunction can be granted by the court in exercise of inherent powers under section 151 of the Code (Ref: *Manohar Lal v. Seth Hiralal*, AIR 1962 SC 527; *ITO v. M.K. Mohd. Kunhi*, AIR 1969 SC 430; *Tanusree v. Ishani Prasad*, (2008)4 SCC 791; 2008(2) ARC 197.

When the court proposes to grant ex parte injunction without issuing notice to opposite party, proviso to Rule 3 enjoins the court to record reasons for its opinion that the object of granting injunction would be defeated by delay. The requirement of recording of reasons is not a mere formality but a mandatory requirement.

In *Shiv Kumar Chada Versus Municipal Corporation of Delhi*, the Supreme Court stated as under:

".....the court shall record the reasons why an ex parte order of injunction was being passed in the facts and circumstances of a particular case. In this background, the requirement for recording the reasons for grant of ex parte injunction, cannot be held to be a mere formality. This requirement is consistent with the principle, that a party to a suit, who is being restrained from exercising a right which such party claims to exercise either under a statute or under the common law, must be informed why instead of following the requirement of Rule '1, the procedure prescribed under the proviso has been followed. The party which invokes the Jurisdiction of the court for grant of an order of restrain against a party, without affording an opportunity to him of being heard, must satisfy the court about the gravity of the situation and court has to consider briefly these factors in the ex parte order. We are quite conscious of the fact that there are other statutes which contain similar provisions requiring the court or the authority concerned to record reasons before exercising power vested in them. In respect of some of such provisions it has been held that they are required to be complied with but non-compliance therewith will not vitiate the order so passed. But same cannot be said in respect of the proviso to Rule 3 of Order 39. The Parliament has prescribed a particular procedure for passing of an order of injunction without notice to the other side, under

exceptional circumstances. Such ex parte orders have far-reaching effect, as such a condition has been imposed that court must record reasons before passing such order."

Applying the law to the facts of the case at hand. The suit was filed on 31.05.2013 and thereafter it was adjourned at the behest of the plaintiff/petitioner for 04.07.2013 and again on the said date adjourned was sought and 09.07.2013 was the next date fixed and it is on that date an ex parte temporary injunction was granted i.e. after a lapse of forty days from the institution of suit.

The lower appellate court, by the impugned order dated 16.12.2013, set aside the ex parte injunction order and the present writ petition was filed on 29.04.2014 i.e. after a lapse of four months. The trial court while granting ex parte temporary injunction, has ordered that 'title prima facie proved, the matter is of immediate nature, in view of the facts and circumstances the parties to maintain status quo on the spot till the next date' (translated from hindi). There is no discussion in the entire order as to how the conclusion has been arrived at by the trial court that the ex parte injunction be granted without notice to the defendants. The suit admittedly was filed on 31.05.2013 and injunction was granted on 09.07.2014 after a lapse of 40 days, this time period was sufficient for putting the defendants to notice, rule 3 of Order XXXIX C.P.C. requires that only in case where it appears to the Court that object of granting injunction would be defeated by the delay, it has power to grant ex parte injunction. In such circumstances also, the court has to record reasons for its opinion that the object of granting injunction would be defeated by delay.

The contention of learned counsel for the petitioner that the affidavit in support of the injunction application made out a case for grant of ex parte injunction order which was sufficient for the court for forming its opinion to grant ex parte injunction order, cannot be accepted for the simple reason that where law requires recording of reasons for doing a particular act, the mere presence of material or assertions made in the affidavit is not sufficient, it must also be shown that the court has applied its mind to the material/assertions and reasons for existence of grave urgency must find place in the order of the court. Ex parte injunction order was passed after forty days from institution of the suit and the writ petition challenging the lower appellate courts order was filed after 130 days, this clearly demonstrates that there was no grave urgency in granting ex parte injunction order.

It is of utmost importance to note that an ex parte order of injunction is an exception, the general rule is that injunction order be passed only after

notice to the defendant. It is only in rare cases where the court finds that the object of granting injunction would be defeated by delay, the court can grant injunction ex parte but that too only after recording reasons having regard to the mandatory provisions of rule 3 of Order 39, ex parte injunction is not routine matter and it must be borne in mind by the courts below.

In the facts and circumstances of the present case and for the reasons and law stated herein above, the lower appellate court did not commit any illegality or jurisdictional error in vacating the ex parte injunction order; this court declines to interfere with the impugned order under Article 226/227 of the Constitution of India.

The writ petition is, accordingly, dismissed. [**Yogesh Agarwal v. Sri Rajendra Goyal, 2014(3) ARC 427**]

**Order XXXIX, Rule 3 – Ex parte temporary injunction – Expert order of injunction is an exception and general rule, is that injunction order be passed only after notice defendant.**

The petitioner filed Suit No. 445 of 2013 on 31.5.2013 for permanent prohibitory injunction against the defendant/ respondents along-with an application for temporary injunction. The plaintiff/ petitioner on request got the suit adjourned for 4.7.2013 and again it was adjourned for 9.7.2013 on the said date an ex parte injunction was granted. Aggrieved, the respondent/ defendants preferred Misc. Appeal No. 93 of 2013. Rajendra Goel and another v. Yogesh Agarwal and others. The appellate court by the impugned order dated 16.12.2013 set aside the temporary injunction order dated 9.7.2013 passed by the trial court which is assailed in the present petition.

The contention of learned counsel for the petitioner that the affidavit in support of the injunction application made out a case for grant of ex parte injunction order which was sufficient for the court for forming its opinion to grant ex parte injunction order, cannot be accepted for the simple reason that where law requires recording of reasons for doing a particular act, the mere presence of material or assertions made in the affidavit is not sufficient. It must also be shown that the court has applied its mind to the material/assertions and reasons for existence of grave urgency must find place in the order of the court. Ex parte injunction order was passed after forty days from institution of the suit and the writ petition challenging the lower appellate courts order was filed after 130 days, this clearly demonstrates that there was no grave urgency in granting ex parte injunction order.

It is of utmost importance to note that an ex parte order of injunction is an exception the general rule is that injunction order be passed only after

notice to the defendant. It is only in rare cases where the court finds that the object of granting injunction would be defeated by delay, the court can grant injunction ex parte but that too only after recording reasons having regard to the mandatory provisions of Rule 3 of Order XXXIX, ex parte injunction is not routine matter and it must be borne in mind by the courts below.

In the facts and circumstances of the present case and for the reasons and law stated hereinabove, the lower appellate court did not commit any illegality or jurisdictional error in vacating the ex parte injunction order. [Yogesh Agarwal v. Rajendra Goyal and others, 2014(6) AWC 5892]

**Revisional Jurisdiction - The High Court is entitled to satisfy itself the correctness, or legality or propriety of any decision or order impugned before it. However, to satisfy itself to the regularity, correctness, legality or propriety of the impugned decision or the order, the High Court shall not exercise its powers as an appellate power to re-appreciate or re-assess the evidence for coming to a different finding on facts.**

The decision of this Court in *V.M. Mohan v. Prabha Rajan Dwarka and ors.* (2006)9 SCC 606 is again in line with the judgment of this Court in *Rukmin Amma Saradamma v. Kallyani Sulochana and others*, (1993) 1 SCC 499. We hold, as we must, that none of the above Rent Control Acts entitles the High Court to interfere with the findings of fact recorded by the First Appellate Court/First Appellate Authority because on reappreciation of the evidence, its view is different from the Court/Authority below. The consideration or examination of the evidence by the High Court in revisional jurisdiction under these Acts is confined to find out that finding of facts recorded by the Court/Authority below is according to law and does not suffer from any error of law. A finding of fact recorded by Court/Authority below, if perverse or has been arrived at without consideration of the material evidence or such finding is based on no evidence or misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice, is open to correction because it is not treated as a finding according to law. In that event, the High Court in exercise of its revisional jurisdiction under the above Rent Control Acts shall be entitled to set aside the impugned order as being not legal or proper. The High Court is entitled to satisfy itself the correctness or legality or propriety of any decision or order impugned before it as indicated above. However, to satisfy itself to the regularity, correctness, legality or propriety of the impugned decision or the order, the High Court shall not exercise its power as an appellate power to reappreciate or re-assess the evidence for coming to a different finding on facts. Revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a

court of first appeal. Where the High Court is required to be satisfied that the decision is according to law, it may examine whether the order impugned before it suffers from procedural illegality or irregularity. [**HPCL v. Dil Bahar Singh, 2014(32) LCD 2296**]

## **Constitution of India**

**Arts. 16, 226 – U.P. Employment of Department of Govt. servant Dying in Harness Rules, 1974, R. 5(3)(4) – Compassionate appointment – Right to remarry – Remarriage is a personal choice of employee, under the provisions of Dying in Harness Rules, 1974**

Perusal of Rules would go to show that every appointment made under sub-rule (3) of the Rule 5 is subject to the condition that said person has to maintain other member of the family of the deceased, who were dependent on deceased immediately. Sub-rule (4) of Rule 5 clearly proceeds to mention that where a person is unable to maintain the other member of the family of the deceased as per sub-rule (3) of Rule 5 then his service may be terminated under U.P. Government Servant (Discipline and Appeal) Rules, 1999, as amended from time to time. The only obligation cast upon the person at the time of offering employment under Ding in Harness Rules, 1974 is that a person shall maintain other member of the family who were dependent on deceased, and in case a person is unable to maintain the family member of the deceased then services of a person may be terminated as per U.P. Government Servant (Discipline & Appeal) Rule, 1999. Affidavit as has been so taken from the petitioner that she would not remarry is not at all subscribed by rules and as petitioner has submitted her affidavit, petitioner is before this Court with request that she should be accorded permission to remarry.

In view of this affidavit, which has been so given by the petitioner that she would not remarry is neither here nor there. Petitioner is free to solemnize the remarriage, but she will have to kept in mind sub-rule (3) and (4) of Rule 5 of 1974 Rules. The petitioner to show her bonafides has contended before this Court that 1/3rd of her salary would be paid to her mother-in-law each and every month after she contracted marriage. (**Ankita Srivastava v. State of U.P., 2014 (6) SLR 638 (All.)**)

**Arts. 20 and 311 – Enquiry proceedings – Charge-sheet and the enquiry proceedings sought to be initiated against the petitioner are barred by principle of double jeopardy as also general principle of res judicata**

By this writ petition, the petitioner impugns the action of the

employer/respondent no.1/Delhi Financial Corporation for issuing a second charge-sheet dated 14.11.2007, although, there was an earlier enquiry report with respect to a charge-sheet dated 21.12.2004 exonerating the petitioner on more or less the same set of allegations. Effectively, the petitioner pleads the bar of double jeopardy or bar of conducting of a fresh enquiry on the basis of a new charge-sheet containing allegations in the old charge-sheet, on account of general principles of *res judicata*.

In this matter court has held, it is clear that the charge-sheet dated 14.11.2007 and the enquiry proceedings sought to be initiated thereupon against the petitioner by the respondent no.1 are barred by principle of double jeopardy as also general principle of *res judicata*.

The writ petition is therefore allowed and the memorandum of charges dated 14.11.2007 and all proceedings emanating therefrom by the respondent no.1 are quashed. **(B.S.Chowdhury v. Delhi Financial Corporation and others, 2014 (6) SLR 545 (Delhi)**

**Art. 32-Public interest litigation—Scope of—Legal total as to PIL—Only person having cause of action to approach**

The legal tool of Public Interest Litigation was invented by the Courts as an exception to the otherwise well established rule, of only a person having cause of action or *locus standi* being entitled to approach the Court. Such invention was deemed necessary finding that in certain situations, owing to social or economic backwardness or other reasons the aggrieved parties were themselves unable to approach the Court (see **S.P. Gupta Vs. UOI 1981 Supp.(1) SCC 87 and State of Uttaranchal Vs. Balwant Singh Chauhal (2010) 3 SCC 402**). The field of operation of the said tool was expanded to cover situations where a general direction of the Court was deemed necessary, not for the benefit of any one person or a group of persons but for the benefit of the public generally viz. protection and preservation of ecology, environment etc. and for maintaining probity, transparency and integrity in governance. The Supreme Court else has been repeatedly issuing warnings, of allowing the said tool of Public Interest Litigation to be misused (see **Balco Employees Union (Regd.) Vs. Union of India (2002) 2 SCC 333**). The petitioner has been unable to satisfy us as to how it is entitled to file this petition in public interest. The warnings issued by the Supreme Court, of Public Interest Litigation becoming Publicity Interest Litigation (see **Neetu Vs. State of Punjab (2007) 10 SCC 614**) and of allowing "meddlesome interlopers" to file Public Interest Litigation (see S.P. Gupta) is opposite in this regard. Similarly, in **Holicow Pictures Pvt. Ltd. Vs. Prem Chandra Mishra AIR 2008 SC 913** it was held that Public

Interest Litigation is to be used for delivering social justice to the citizens. [Shahid Ali vs. Union of India and another, 2014 (4) ESC 1903 (Del)(DB)]

**Article 194(3) – Privilege of legislative assumption and its member – scopes of privileges enjoyed by members**

It is clear that the basic concept is that the privileges are those rights without which the House cannot perform its legislative functions. They do not exempt the Members from their obligations under any statute which continue to apply to them like any other law applicable to ordinary citizens. Thus, enquiry or investigation into an allegation of corruption against some officers of the Legislative Assembly cannot be said to interfere with the legislative functions of the Assembly. No one enjoys any privilege against criminal prosecution.

According to Erskine May, the privilege of freedom from arrest has never been allowed to interfere with the administration of criminal justice or emergency legislation. Thus, in any case, there cannot be any privilege against conduct of investigation for a criminal offence. There is a provision that in case a member is arrested or detained, the House ought to be informed about the same.

Thus, it is amply clear that the Assembly does not enjoy any privilege of a nature that may have the effect of restraining any inquiry of investigation against the Secretary or the Deputy Secretary of the Legislative Assembly.

Thus, from the above, it is clear that neither did the House of Commons enjoy any privilege, at the time of the commencement of the Constitution, of a nature that may have the effect of restraining any inquiry or investigation against the Secretary or the Deputy Secretary of the Legislative Assembly or for that matter against the member of the Legislative Assembly or a Minister in the executive Government nor does the Parliament or the Legislative Assembly of the State or its members. The laws apply equally and there is no privilege which prohibits action of registration of a case by an authority which has been empowered by the Legislature to investigate the cases. Simply because the officers belong to the office of the Hon'ble Speaker of the Legislative Assembly, the provisions of the Act do not cease to apply to them. [Justice Ripusudan Dayal (Retd.) and others v. State of M.P. and others, 2014(6) AWC 5807]

**Articles 226 and 227- Judicial review –Scope of very limited and narrow**

In supervisory jurisdiction of this Court over subordinate courts. The scope of judicial review is very limited and narrow. It is not to correct the errors in the orders of the court below but to remove manifest and patent errors

of law and jurisdiction without acting as an appellate authority. (**Ramesh Chandra and others v. Shyam Ji Misra and others, 2014 (5) AWC**)

**Article 226 – Specific performance of contract – Jurisdiction of High Court under Article 226 – High Court in exercise of its jurisdiction u/A. 226 of the Constitution would not normally grant the relief of specific performance of contract**

The High Court, in our opinion, has rightly observed that the appellant can seek the appropriate relief by way of a civil suit. The High Court in exercise of its jurisdiction under Article 226 of the Constitution of India would not normally grant the relief of specific performance of a contract. [**Sri Ram Builders v. State of M.P. and others, 2014(6) AWC 5987**]

**Article 226 – Contract Act, Sec. 56 – Breach of Contract – Judicial review – Scope – The scope of judicial review is very limited in contractual matters even where one of the contracting parties is state of an instrumentality of**

The scope of judicial review is very limited in contractual matters even where one of the contracting parties is the State or an instrumentality of the State. The parameters within which power of judicial review can be exercised, has been authoritatively laid down by this Court in a number of cases.

In *Tata Cellular v. Union of India*, (1994)6 SCC 651, this court upon detailed consideration of the parameters within which judicial review could be exercised, has culled out the following principles:

70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

\* \* \*

77. The duty of the court is to confine itself to the question of

legality. Its concern should be:

- (1) Whether a decision-making authority exceeded its powers?
- (2) committed an error of law,
- (3) committed a breach of the rules of natural justice,
- (4) reached a decision which no reasonable tribunal would have reached, or
- (5) abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) **Illegality:** This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) **Irrationality, namely, Wednesbury unreasonableness.**

(iii) **Procedural impropriety.** The above are only the broad grounds but it does not rule out addition of further grounds in course of time.”

**[Sri Ram Builders v. State of M.P. and others, 2014(6) AWC 5987]**

**Art. 311 – Misconduct of consuming liquor while on duty – dismissal from service - validity of**

The appellant-writ-petitioner while serving as Constable (Driver) in the State Police department was served with a memorandum of charges initiating proceeding under Rule 16 of the Rajasthan Civil Services (Classification, Control & Appeal) Rules, 1958 levelling the following charges:-

The appellant-writ-petitioner participated in the enquiry that followed. Thereafter, the Enquiry Officer submitted his report holding that the charges were found proved against him. The appointing authority concurring with the said finding imposed the penalty of dismissal from service. Eventually, he turned to this Court for redress by filing S.B. Civil Writ Petition No.3231/2011.

The learned Single Judge negated the challenge, where after, he preferred D.B.Civil Special Appeal (Writ) No.792/2011, which by judgment and order dated 29.6.2011 was also dismissed.

A Co-ordinate Bench of this Court while dismissing the appeal rejected all these contentions on a detailed consideration of all relevant aspects factual and legal. It was recorded inter-alia that in the light of the statement of the appellant-writ-petitioner himself one could come to the conclusion that he had consumed liquor on the date of incident while on duty and that no further evidence was necessary to prove the charges levelled against him. It was noted as well that the evidence of the doctor also proved that he had consumed liquor. The Coordinate Bench therefore returned a categorical finding that the charges levelled against the appellant-writ-petitioner had stood proved. Vis-a-vis the plea that his past conduct could not have been taken into consideration for determining the penalty, the Coordinate Bench held that even de hors the same, the misconduct proved against him on the charges levelled was adequate enough to warrant his dismissal from service, more particularly in view of the fact that he at all relevant times was a member of the disciplined force.

Court is of the unhesitant opinion that not only the plea is untenable on the face of it, it by no means constitutes a ground for review. The Coordinate Bench of this Court having dealt with all factual and legal aspects and recorded categorical finding vis-a-vis the charges proved against the appellant-writ petitioner, court do not find any cogent and convincing reason to entertain the instant petition. More importantly, as adverted to hereinabove, the Coordinate Bench did in fact deal with the contention now raised and rejected the same on merits. We are in respectful agreement with the conclusions recorded. **(Samunder Singh v. State of Rajasthan, 2014 (6) SLR 616 (Raj.)**

**Art. 324 –Deposit of Fire –arms for maintaining Law and order in order to ensure free and fair elections –consideration of –Entire exercise for deposit of fir-arms is to be proceeded by review/assessment on objective basis after complying mandate of law and not in mechanical manner**

The grievance of petitioners is that in the absence of any power to insist for a deposit of fire-arms under the Arms Act, 1959 (for short "the Act") and the Rules framed therein, no power is vested in police authorities to call upon licensees to do so even on the ground of ensuing Parliamentary elections. It is further submitted that power, if any, is to proceed against an individual licensee on a case-to-case basis either under the Act or under the Code of Criminal Procedure, 1973.

All the petitions allege that either on mere oral dictates of the Station

House Officer concerned or by a written notice of the Officer In-charge of the Police Station concerned, such as, in the connected Writ Petition No. 17030 of 2014, the petitioner has been called upon to deposit his arm either at the police station or with the arms dealer, but in the letter dated 1.4.2014, addressed to the learned Standing Counsel, the Officer In-charge has attempted to deny that the said notice has any compulsive binding effect to deposit the arm, which the Court otherwise finds it to be factually incorrect, as the notice does call upon the licensee to deposit his arm in view of forthcoming Parliamentary elections without complying the mandate of law. Thus, the notice is in the teeth of the aforesaid legal position as the same was not preceded by any objective review/assessment in accordance with law. The Court also finds that there is a notice dated 7.3.2014, published in Rashtriya Sahara, Kanpur, annexed with Writ Petition No. 17436 of 2014, wherein it is alleged that In-charge of P.S. Rath, District Hamirpur has called upon arms licensee to deposit their fire-arms. The notice also states that Constables have been given directions to visit the area concerned and to ensure deposit of fire-arms. It further provides licensees who fail to deposit fire-arm, would be appropriately proceeded with.

Undoubtedly, neither law contemplates deposit of fire-arm in a mechanical manner nor is it the mandate of the Election Commission of India to ensure deposit of fire-arms without complying the provisions of law. As stated above the entire exercise for deposit of fire-arms is to be preceded by review/assessment on a objective basis after complying the mandate of law and not in a mechanical manner.

Thus, all petitions are disposed of with the following directions.

1. A mandamus is issued to the respondents not to compel the petitioners / arms licensees to deposit their fire-arms, unless their case/cases has / have been objectively (emphasis is mine) reviewed/assessed by a competent authority in writing and after complying with the provisions of law.

2. The Director General, U.P. Police, Lucknow shall forthwith issue instructions to all Senior Supdt. of Police/Supdt. of Police of the districts concerned to ensure that the aforesaid mandamus is complied with. **(Harihar Singh and others v. State of U.P. and others 2014 (5) AWC 5416)**

## **Consumer Protection Act**

**Ss. 15, 17, 19 – Insurance – Theft of goods – Significance of survey Report – Surveyor's report has significance evidentiary nature unless it is proved otherwise.**

M/s Lightwalas, the complainant, transacts the business of fancy lights etc. Its proprietor Lokesh Gupta took a hypothecation limit for his stock from the company and insured them from Bank of India-OP-1. The National Insurance Company Limited-OP-2 issued the policy. The goods were stolen on 29.10.2009, during the night time, by breaking shutter. The FIR was lodged on 01.11.2009. Culprits could not be arrested and goods could not be traced. The complainant made a claim in the sum of Rs.3.5lakh. The Insurance Company estimated the value to be just Rs.46,000/-.

The District Forum partly allowed the complainant and ordered the Insurance Company to pay Rs.46,242/- with 10% interest 10.06.2010 and costs of Rs.10,000/- for physical, mental and economic losses and complaint expenses in the sum of Rs.1,000/-. The appeal filed by the complainant was dismissed. Before the State Commission it was argued that the surveyor report should be rejected because it is fraudulent and rejected the claim of the complainant on the basis of their bills. It was also urged that the complainant had provided all the bills and documents to the surveyor. The State Commission, too, dismissed his appeal.

It is well settled that the report of the surveyor has to be given due weightage. This view neatly dovetails by the authority by the Apex Court reported in United India Insurance Co. Ltd. & Others Vs. Roshan Lal Oil Mills Ltd. & Ors., (2000)10 SCC 19.

This Commission in a case reported in D. N. Badoni vs. Oriental Insurance Co. Ltd., 1(2012) CPJ 272 (NC): 2012(2) CPR 165 (NC), headed by Hon'ble Justice Ashok Bhan was pleased to hold that Surveyor's report has significant evidentiary value unless it is proved otherwise, which the petitioner has failed to do so in the instant case.

So the Revision Petition is meritless, therefore, the same is dismissed. **[M/s. Lightwalas, Through-Pro. Lokesh Gupta vs. Bank of India, Through Branch Manager & Anr., 2014(4) CPR 772(NC)]**

**Ss. 15,17,19 – Medical services in Govt. hospital – Negligence of – whether a person who avails facility of medical treatment in Govt. Hospital is consumer and his complaint is maintainable under C.P. Act – Held, “No”**

Complainant/petitioner employer of Police Department sustained injury

on duty on 21.1.2006 and was referred to Civil Hospital, Hoshiarpur, Complainant remained under treatment of OP No.3/ Respondent No.3 from 1.2.2006 to 6.3.2006. On 10.3.2006, OP No.3 operated complainant and cut wrong vein and ultimately after treatment in Tagore Hospital and Pasricha Hospital, Jalandhar, his right foot was amputated on 27.4.2006 and he was declared 40% handicapped. Complainant was appointed by OP NO.1/Respondent No.1 and OP No.1 has to bear expenses of medical treatment of the complainant. Alleging deficiency on the part of OP, complainant filed complaint before District Forum. OP No. 1 & 2 resisted complaint and submitted that complainant is not consumer qua OP NO.1 as he availed services free of cost. It was further submitted that complicated questions were involved and there was misjoinder of parties and negligence on the part of doctor was denied and prayed for dismissal of complaint. OP No.3 also raised similar objections and prayed for dismissal of complaint.

It has held that where services are rendered free of charge to everybody availing the said services, patient does not fall within purview of consumer. In the case in hand, learned Counsel for the petitioner could not place any document on record to prove that OP No.2, where OP No. 3 was working as surgeon was not rendering services free of charge to everybody and in such circumstances, complainant does not fall within purview of consumer.

This Commission in *Consumer Unity & Trust Society, Jaipur v. The State of Rajasthan & Ors.*, 1(1992) CPJ 259 (NC), observed that a person who avails facility of medical treatment in Government hospital is not a consumer and no complaint is maintainable under C.P. Act. [**Major Singh vs. State of Punjab, Through Collector & Ors., 2014(4) CPR 697(NC)**]

**Ss.15,17,19 – Execution of award – Award passed by Consumer Forum cannot be flouted**

Complainant/Respondent No.1 filed complaint before District Forum against OPs-Petitioners and Respondent Nos. 2,3 & 4 and learned District Forum allowed complaint and directed OPs to refund deposited amount to the complainant along with interest. Appeal filed by the petitioner was dismissed by learned State Commission against which, revision petition was filed by petitioners before this Commission. This Commission passed following order on 17.8.2012:

“Heard.

Issue notice of application for stay to the respondents returnable on 21.11.2012, the date already fixed

In the meanwhile, operation of impugned order shall remain stayed subject to the petitioner's depositing 50% of the awarded amount with the District Forum, within four weeks, in each case.

On receipt of the said amount, the District Forum shall put the same in Fixed Deposit Account in a nationalized Bank initially for a period of one year."

As petitioners did not deposit 50% of the awarded amount within 4 weeks with the District Forum, District Forum in Execution Petition issued warrants of arrest against the petitioner. Appeals filed by petitioners were dismissed by learned State Commission vide impugned order against which, these revision petitions have been filed.

Perusal of main order of District Forum reveals that OPs have not been held responsible jointly & severally and in such circumstances, complainant cannot recover whole awarded amount from any of the five OP and he is entitled to recover only 1/5<sup>th</sup> share of the awarded amount from each of the OP. In such circumstances, in the light of order of this Commission, petitioner was required to deposit 50% of the amount with interest only to the extent of his share i.e. 1/5<sup>th</sup>, which was to be paid by him to the complainant. Learned State Commission erroneously observed that full amount can be recovered from any of the OPs and committed error in dismissing appeal; even though, petitioners had deposited 50% of the amount which was required to be paid by them. Learned Counsel for the respondent could not place any law in support of his contention that even if OP is not held liable jointly and severally, complainant can recover full amount from any of the OPs. In such circumstances, petitioners were under an obligation to deposit 50% amount only of their liability.

Counsel for the petitioners submitted that they have deposited 1/5<sup>th</sup> share of their liability with interest, but it appears that they have deposited amount after deducting Rs. 25,000/- which they have deposited before State Commission. Amount of Rs.25,000/-, i.e. statutory amount for filing appeal cannot be deducted from the share to be deposited with District Forum for operation of stay order and in such circumstances, petitioners are bound to deposit 1/5<sup>th</sup> share of their liability without deducting Rs.25,000/- for getting benefit of stay order.

Consequently, Revision Petition filed by the petitioners is allowed and orders dated 18.11.2013 passed by the State Commission in Appeal No. 493/2013 – Raj Kumar Goyal & Anr. vs. Kamal Chaduhary & 4 Ors. and order of District Forum dated 23.10.2013 are set aside and District Forum is directed to withdraw warrants of arrest issued against petitioners if petitioners deposit

remaining amount making i.e. 1.5<sup>th</sup> share within two weeks with the District Forum in each case from the date of pronouncement of the order. [**Raj Kumar Goyal & Anr. vs. Kamal Chaudhary & Ors., 2014(4) CPR 743(NC)**]

**S.21 – Medical Services – Gross deficiency – Trial of criminal cases against opposite party is no ground for stay of proceedings before consumer fora**

In this case, all these sixteen complaints u/s. 21(a)(i) of the Consumer Protection Act, 1986 (for short, “the Act”), against AMRI Hospital, Kolkata, arise out of the same incident of fire, in which a large number of human lives were lost and perhaps equal number of the patients had suffered grievous injuries. Therefore, all these complaints are being dealt with by this common order.

It is alleged that there were gross negligence and deficiency in service on the part of the Hospital because: (i) the security personnel on duty did not immediately call the fire brigade for assistance; (ii) the fire brigade reached the spot after two hours of noticing of fire and that too when a call was made to them by a patient; (iii) the fire alarms and sprinklers, mandatory in such kind of multi-storeyed buildings, did not function at the time of fire as these were either switched off or were not installed properly; (iv) insistence of the staff of the Hospital in clearing the outstanding bills at the crucial stage before leaving the Hospital, was not only inhuman, it resulted in loss of human lives; (v) the hospital staff, including the nurses on duty, did not make any attempt to take care and guide the patients, some of them being in critical condition and unable to move; and (vi) to facilitate some fresh air coming in and emergency exit for those trapped inside, the glass panes were not broken by the staff.

As regards the question of stay of the proceedings in the Complaints because of pendency of criminal cases against the Opposite Party, we are of the view that this plea also merits rejection. Recently the question of simultaneous prosecution of the criminal proceedings with civil suit came up for consideration of the Supreme Court in *Guru Granth Saheb Sthan Meergat Vanaras* (supra). Relying on the observations of the Constitution Bench of the Supreme Court in *M.S. Sheriff v. State of Madras*, AIR 1954 SCC 397, the Court held that no hard and fast rule could be laid down in this regard. Nonetheless the possibility of conflicting decisions in the civil and criminal courts is not a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one court binding on the other, which is not even the case of the Opposite Party here. [**Indrani Chatterjee & Anr. vs. AMRI Hospitals, Through its Management, 2014(4) CPR 681(NC)**]



## **Contempt of Courts Act**

### **Contempt jurisdiction –Exercise of – Guidelines issued**

It would be necessary, at the outset, to reiterate the fundamental principles of law governing the exercise of the contempt jurisdiction. The principles which we now formulate herein below, would be supported by precedent on the subject:

(i) In the exercise of the contempt jurisdiction, it is not open to the Court to travel beyond the order of which a breach is alleged. The jurisdiction in contempt has to be exercised with a view to determine as to whether the order of which a breach has been alleged, has been complied with or not.

In *Jhareshwar Prasad Paul vs. Tarak Nath Ganguli*, reported in 2002 (5) SCC 352, para 11, this principle was formulated as follows:

".....The Court exercising contempt jurisdiction is not entitled to enter into questions which have not been dealt with and decided in the judgment or order, violation of which is alleged by the applicant. The Court has to consider the direction issued in the judgment or order and not to consider the question as to what the judgment or order should have contained. ....If the judgment or order does not contain any specific direction regarding a matter or if there is any ambiguity in the directions issued therein then it will be better to direct the parties to approach the court which disposed of the matter for clarification of the order instead of the court exercising contempt jurisdiction taking upon itself the power to decide the original proceeding in a manner not dealt with by the court passing the judgment or order."

In a recent judgment of the Supreme Court, *Sudhir Vasudeva, Chairman & MD vs. M. George Ravishekarana & others*, delivered on 4th February, 2014 in Civil Appeal No. 1816 of 2014 the Supreme Court held as follows:

"The power vested in the High Courts as well as this Court to punish for contempt is a special and rare power available both under the Constitution as well as the Contempt of Courts Act, 1971. It is a drastic power which, if misdirected, could even curb the liberty of the individual charged with commission of contempt. The very nature of the power casts a sacred duty in the Courts to exercise the same with the greatest of care and caution. This is also necessary as, more often than not, adjudication of a contempt plea involves a process of self determination of the sweep, meaning and effect of the order in respect of which disobedience is alleged. Courts must not, therefore, travel beyond the four corners of the order which is alleged to have been flouted or enter into questions that have not been dealt with or decided in

the judgment or the order violation of which is alleged. Only such directions which are explicit in a judgment or order or are plainly self evident ought to be taken into account for the purpose of consideration as to whether there has been any disobedience or willful violation of the same. Decided issues cannot be reopened; nor the plea of equities can be considered. Courts must also ensure that while considering a contempt plea the power available to the Court in other corrective jurisdictions like review or appeal is not trenched upon. No order or direction supplemental to what has been already expressed should be issued by the Court while exercising jurisdiction in the domain of the contempt law; such an exercise is more appropriate in other jurisdictions vested in the Court, as noticed above. The above principles would appear to be the cumulative outcome of the precedents cited at the bar, namely, Jhareswar Prasad Paul and Another vs. Tarak Nath Ganguly and Others[3], V.M.Manohar Prasad vs. N. Ratnam Raju and Another[4], Bihar Finance Service House Construction Cooperative Society Ltd. vs. Gautam Goswami and Others[5] and Union of India and Others vs. Subedar Devassy PV[6]."

(ii) In exercise of the contempt jurisdiction, the order of the Court of which a breach is complained of, has to be read and interpreted as it is and not as it should be. The court cannot take a different view in exercise of the contempt jurisdiction on the merits of the case. For that matter, the Court cannot make either an addition or deletion from the original order of the Court.

Now, in the present case, when the contempt petition came up for hearing, the learned Judge was satisfied that no case was made out for subjecting the appellants to the contempt jurisdiction. Several affidavits have been filed on behalf of the appellants clarifying that in compliance of the order, which was passed by the Division Bench on 9 November, 2006, payments have been made to the respondent of the outstanding dues including pension, gratuity, leave encashment, suspension allowance and arrears of salary.

The only question before the Court was as to whether the order of the Division Bench dated 9 November 2006 has been complied with or not. It is no part of the jurisdiction of the Court in contempt proceedings to go behind the order and direct the payment of compound interest more particularly despite a clear defence that payment of compound interest on gratuity is not permissible in terms of the Government order dated 30 October 2002. If the respondent was contesting the issue, the proper remedy was elsewhere and not in taking recourse to the contempt jurisdiction. Similarly the second order of the learned Single Judge, which is a purported clarification of the first order, equally for the same reason, is beyond jurisdiction. **(Dr. Arvind Narain Misra and another v. Dilip Singh Rana, 2014 (5) AWC5019)**



## **Criminal Procedure Code**

### **S.245(2)-Maintainability of discharge application – order of discharge can be passed at any previous stage of the case**

With regard to the scope and ambit of section-245(2) Cr.P.C. it shall be apt to recall the Apex Court's decision given in Cricket Association Bengal and others v. State of West Bengal and others, 1971 (3) SCC 239. That was a case in which after summoning the accused under certain sections the matter had reached the High Court and certain observations and directions were also given by the High Court in the order which it passed. Later on some such developments took place that the discharge was sought in the Trial Court even before the stage of 245(1) Cr.P.C. had arrived. The Trial Court of the Magistrate discharged the accused under 253(2) Cr.P.C. (old Code). A Division Bench of the High Court after having come to know the fact of discharge took cognizance of the matter *suo moto* and then set aside the order of discharge as, apart from other grounds, it was also held by the High Court that the orders discharging the accused under section 253(2) of Cr. P.C. was not justified as the offence involved was relating to a warrant case.

Thereafter, the matter came up before the Hon'ble Supreme Court. The Apex Court after expatiating upon the law on the point took a view that it was very much within the powers of the Magistrate to discharge an accused at any previous stage of the case i.e. to say any stage prior to the stage contemplated under section 245(1) of Cr.P.C. The relevant extract from the Apex Court's decision may be quoted herein below:-

“It is this serious mistake committed by Division Bench that has resulted in the passing of the order under attack. The legality of the orders passed by the Chief Presidency Magistrate can be considered from two points of view. Assuming that the Chief Presidency Magistrate has still to proceed with the trial for offences under sections 337 and 338. I.P.C. it is no doubt true that he has to follow the warrant case procedure. Even under such circumstances, the Magistrate has got ample jurisdiction to discharge the accused under section 253(2) Cr.P.C. Section 253 deals with the discharge of accused. Sub-section (1) deals with the discharge of an accused when the Magistrate after taking all evidence referred to in section 253 Cr.P.C. and making such examination of the accused, if any, as may be found necessary, finds that no case against the accused has been made out, which if unrebutted, would warrant his conviction. Sub-section (2) of section 253 is to the following effect:

“253(2) Nothing in this section shall be deemed to prevent a magistrate

from discharging the accused at any previous stage of the case if, for reasons to be recorded by Magistrate, he considers the charge to be groundless”

This sub-section gives ample jurisdiction to the Magistrate to discharge an accused in the circumstances mentioned therein and the order of discharge can be passed at any previous stage of the case. Sub-section (1) under those circumstances will not operate as a bar to the exercise of jurisdiction by the Magistrate under sub-section (2). It is under sub-section (2) of section 253 that the Magistrate has discharged the accused. He has given good reasons in the order for discharging the accused. [**Suleman and others v. State of U.P. and another, 2014 (87) ACC 23 Allahabad High Court**].

**Section 407-Transfer of trial- The justice delivery system knows no caste, religion, creed, colour etc. It is a system following principle of black and white, i.e., truth and false- If there is a deliberate attempt to scandalize a Judicial Officer of subordinate Court, it is bound to shake confidence of the litigating public in the system and has to be tackled strictly.**

This is an application filed under section 407 Cr.P.C. seeking transfer of Sessions Trial No. 1162 of 2009 (Case Crime No. 264 of 2004) pending in the Court of Additional Sessions Judge, Court No. 7, Muzaffar Nagar to the Court of equal jurisdiction of any other adjacent District. Counsel for applicants contended that earlier trial reached to the stage of hearing in the Court of Additional Sessions Judge, Court No. 9 when District Judge transferred it to Court No. 7 where against applicants came to this Court in Transfer Application (Criminal) No. 261 of 2013 and this Court disposed of the same vide judgment dated 9.5.2014 directing that the trial shall continue in the Court of Additional Sessions Judge Court No. 9. However, it is stated in para 18 of the affidavit that in the meantime Presiding Officer of Court No. 9 stood changed and thereafter trial was transferred from Court No. 9 to Court No. 7 by District Judge by order dated 21.7.2014. Now this application has been filed alleging that District administration, in order to get a particular result in the trial, is pressurizing the Presiding Officer and therefore the said trial has been transferred.

The allegations have been made in para 18 and 19 as if the Judicial Officers are amenable to the approach of District Administration or the political persons, may be Member of Parliament. This assumption without substantiating the same with relevant material is nothing but *per se* cause a serious aspersion on the independence and objective of Indian Judiciary and, in particular, the Members of judicial service. This Court is under constitutional obligation to protect subordinate Judiciary from such unfounded baseless aspersions

otherwise it may shake confidence of public in the independent Judiciary.

In the matters where reckless false allegations are attempted to be made to seek some favourable order, either in a transfer application, or otherwise, the approach of Court must be strict and cautious to find out whether the allegations are *bona fide*, and, if treated to be true on their face, in the entirety of circumstances, can be believed to be correct, by any person of ordinary prudence in those circumstances. If the allegations are apparently false, strict approach is the call of the day so as to maintain not only discipline in the Courts of law but also to protect judicial officers and maintain their self esteem, confidence and above all the majesty of institution of justice.

The justice delivery system knows no caste, religion, creed, colour etc. It is a system following principle of black and white, i.e., truth and false. Whatever is unfair, that is identified and given its due treatment and whatever is good is retained. Whoever suffers injustice is attempted to be given justice and that is called dispensation of justice.

If there is a deliberate attempt to scandalize a Judicial Officer of subordinate Court, it is bound to shake confidence of the litigating public in the system and has to be tackled strictly. The damage is caused not only to the reputation of the concerned Judge, but, also to the fair name of judiciary. Veiled threats, abrasive behavior, use of disrespectful language, and, at times, blatant condemnatory attacks are often designedly employed with a view to tame a Judge into submission to secure a desired order. The foundation of our system is based on the independence and impartiality of the men having responsibility to impart justice i.e. Judicial Officers. If their confidence, impartiality and reputation is shaken, it is bound to affect the very independence of judiciary. Any person, if allowed to make disparaging and derogatory remarks against a Judicial Officer, with impunity, is bound to result in breaking down the majesty of justice.

In my view, this application amounts to gross abuse of process of law and needs be dealt with strictly and seriously.

This application deserves to be dismissed with exemplary cost. It is accordingly dismissed with costs quantified to Rs. 20,000/-. [**Mamnoon and others vs. State of U.P. and another, 2014 (87) ACC 563 Allahabad High Court**]

**Ss. 437, 439- Hearing on bail application – advocates were on strike – not proper ground of adjournment**

If bail application has been filed on behalf of accused through an Advocate and Counsel does not appear on the ground that there is call of strike or any other pretext, the Court concerned must allow the accused, in case he

is present, to address the Court on bail application. It is only if the accused makes a statement that application should be deferred to some other date till his counsel is available, and he is ready to continue in jail, the Court may defer hearing on bail application. Otherwise, bail application should be heard and ought not be deferred only on the ground that Advocates are on strike or not present/ready to address the Court on bail application. If the counsel of accused is present, but counsel appearing for the prosecution/complainant is not present, or seeks adjournment, that by itself would not confer a ground to the Court concerned to defer hearing of bail application, for the reason that a person cannot be allowed to be detained or continue to languish in jail merely for the reason that other side is not ready to address the Court on bail application, on merits. Reasons must have to be assigned by the Court concerned and there must be some special and genuine reason for such deferment, which are beyond the control for learned counsel appearing for the prosecution or the complainant, as the case may be. [**Shashikant Vishwakarlama v. State of U.P. & others, 2015(5) ALJ 521**]

## **Evidence Act**

### **S. 114 (f) –Service of summons- Presumption of**

Under Section 114 Illustration (f) of the Evidence Act, 1872 the Court may presume service of notice through registered post. Expression "may presume" is a factual presumption. Presumption is an inference of a certain fact drawn from other proved facts. While inferring the existence of a fact from another, the court is only applying a process of intelligent reasoning which the mind of a prudent man would do under similar circumstances. Presumption is not the final conclusion to be drawn from other facts. Wherever expression "may presume" has been used in the Act, a discretion has been given to the Court to presume a fact or it may call upon the party to prove the fact by leading evidence. Presumption of service of summon of the defendant is drawn on the basis of report of Process Server. Thus the burden lies upon the plaintiff to prove the report of Process Server was correct. On the denial of service by the defendant, presumption raised under the Act on the basis of expression 'may presume' stood rebutted and burden is shifted upon the plaintiff to prove due service by leading evidence. (**Shiv Murat and another v. State of U.P. and others 2014 (5) AWC 5295**)

**Section 120 of Evidence Act, 1872 – The evidence of husband on behalf of wife was held admissible in law. It was further held that in all civil proceedings the husband or wife of any party to the suit shall be a**

**competent witness who can depose for one another. Writ petition allowed.** AIR 2005 SC 439, (2005)2 SCC 217, 1961 ALJ 353, (2010)10 SCC 512, 2007(40) AWC 4176, Andhra Pradesh Law Times 35, 1996 MLJ 199 ref.

It was observed that Section 120 of the Indian Evidence Act, 1872 provides for the deposition of the husband and wife as witnesses. It reads as under:-

"120. Parties to civil suit, and their wives or husbands, Husband or wife of person under criminal trial-In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively shall be competent witness."

The above provision clearly provides that in all civil proceedings the husband or wife of any party to the suit shall be a competent witness. The aforesaid provision permits the husband to depose for the wife and the vice versa.

The above Rule of law has been enunciated on the well founded Indian mythology wherein husband and wife are believed to be one person and not a separate. It is in consonance with the concept of 'Ardhnariswar'. Even in western culture, wife is referred as a better half meaning to be part of the same person.

In *Rajni Shukla v. Special Judge Banda* 2007(40) AWC 4176 a learned Single Judge of this court while considering the provision of Section 120 of the Evidence Act vis-a-vis the above decision of the Supreme Court in *Janki Vasdev Bhojwani v. Indu Sindh Bank Ltd.*, AIR 2005 SC 439, concluded and held the husband and wife can depose for one another and as such directed that husband of the plaintiff to give oral evidence which shall be confined to the facts within his knowledge.

Thus, in view of the aforesaid facts and circumstances and the legal position as enunciated above, the evidence of the husband of the petitioner so as to prove the notice and its service upon the respondent No.1 is admissible under Section 120 of the Evidence Act and the courts below manifestly erred in law in brushing it aside on the basis of the decision of the Supreme Court in *Janki Vasdev Bhojwani (Supra)* case and in dismissing the suit. [**Smt. Munni Devi v. Smt. Sona Devi, 2014(32) LCD 2623**]

## **Hindu Adoptions and Maintenance Act**

**Section 18 & Section 125 of Cr.P.C. 1973, – Husband suppressing factum**

**of his first marriage, duped and married second time. It was held, the husband cannot be permitted to deny the benefit of maintenance – (2014)1 SCC 188 ref.**

The learned counsel appearing for the appellant contended that the respondent No.1 duped the appellant by suppressing the factum of his first marriage and the provision under Section 18(2) of the Hindu Adoptions and Maintenance Act, 1956, provides for maintenance even to a second wife and the High Court without considering the contentions raised, has rejected the second appeal at the threshold by holding that no substantial question of law arises for consideration and the impugned judgment is liable to be set aside. It is his further contention that in a similar fact situation this Court in the recent decision in *Badshah vs. Urmila Badshah Godse and Another (2014) 1 SCC 18*, held that the husband by suppressing factum of his first marriage duped and married the respondent and hence he cannot be permitted to deny the benefit of maintenance under Section 125 of the Criminal Procedure Code to her, taking advantage of his own wrong and the said ratio is applicable to the present suit filed by the appellant herein. [**Sau Shaila Balasaheb Kadam v. Balasaheb Hindu Rao Kadam, 2014(32) LCD 2486**]

## **Hindu Marriage Act**

**Ss. 13(1)(a) and 25 – Cruelty – What amounts Not allowing spouse for long time, to have sexual intercourse by his or her partners, without sufficient reasons, itself amounts to mental cruelty to such spouse**

The appellant, Vidhya Viswanathan got married to the respondent, Karthik Balakrishnan on 6.4.2005 in Chennai following the Hindu rites. After the marriage, the couple went to London where the respondent (husband) was working, and they lived there for some eight months. In December, 2005, the appellant and the respondent came back to India. However, the appellant went back to England all alone, and his wife did not go there though her husband had purchased a return ticket for her. On 13.9.2008, the husband filed a petition under Section 13(1)(ia) of the Hindu Marriage Act, 1955 for dissolution of marriage. It is pleaded by the respondent (husband) that while the appellant was with him in London, she used to insult him. It is alleged by him that at times she used to get violent and hysterical. The husband further pleaded that even after his best efforts, the appellant did not allow him to consummate the marriage. It is further stated that in November, 2005, i.e., about seven months after marriage the wife (the present appellant) fell sick, and she was taken to a Medical Specialist who diagnosed that she was suffering from tuberculosis,

according to the husband, he provided the best possible treatment to his wife. After the couple came back to India in December, 2005, the wife stayed back in Chennai and continued her treatment. It is alleged by the present respondent (husband) that his wife used to send him e-mails which were derogatory and in bad taste. It is also alleged by the respondent that his wife refused to join his company even after his best efforts. With the above pleadings, the present respondent filed a petition for divorce before the Family Court, Chennai on the ground of cruelty.

The parties led their oral and documentary evidence before the trial court. The First Additional Family Court at Chennai, after hearing the parties vide its judgment and order dated 11.8.2011, dismissed the petition for divorce, and allowed the counter-claim of the wife. Aggrieved by said judgment and order the husband (Karthik Balakrishnan) filed an appeal (C.M.A. No.2802 of 2011 with M.P. No.1 of 2011), before the High Court. The High Court after hearing the parties allowed the appeal, and set aside the judgment and order dated 11.8.2011 passed by the trial court. The High Court allowed the divorce petition, and dissolved the marriage between the parties. Hence, this appeal with special leave petition before this Court.

Undoubtedly, not allowing a spouse for a long time, to have sexual intercourse by his or her partner, without sufficient reason, itself amounts mental cruelty to such spouse. A Bench of Three Judges of this Court in *Samar Ghosh vs. Jaya Ghosh* (2007) 4 SCC 511 has enumerated some of the illustrations of mental cruelty. Paragraph 101 of the said case is being reproduced below:

“101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behavior which may be relevant in dealing with the cases of “mental cruelty”. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language. Petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behavior of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference of total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day-to-day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behavior of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly. If the wife undergoes vasectomy or abortion without medical reason or without the

consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

The above mentioned illustrations. No. (viii) and xii given in Samar Ghosh case (supra). support the view taken by the High Court in holding that in the present case the wife has treated her husband with mental cruelty.

In view of the above principle of law laid down by this Court, and having considered the submissions of parties, and the evidence on record, we do not find any ground to interfere with the decree of divorce passed by the High Court on the ground of cruelty. [**Vidhya Viswanathan v. Kartik Balakrishnan, 2014(6) AWC 5909**]

## **Land Acquisition Act**

**(Since repealed) –Ss. 23 and 25 (Sections 28, 30 and 69 of New Act) – Compensation for land acquired- Market Value- Determination of**

The only point for consideration in these appeals is as to what would be the reasonable deduction towards development charges, to be made from the market value. With regard to the location and potential of the land, the Reference Court held that the acquired land adjoins the abadi of the township of Shahabad and it is in its municipal limits and it is in evidence that around this land there exist DAV College, Girls High school, cinema hall, cold storage, rice mills, grain market and private nursing homes and all the establishments have sprung up before the acquisition and the acquired land had great potential value for development of residential commercial and industrial units. The learned single Judge while referring to the contention of the State that the land in question was recorded as agricultural land has held that the State has produced no evidence to establish the same and on the contrary the testimony of PW1 on oath that the land lies within the municipal limit of Shahabad remained un rebutted.

In court view, the High Court on the facts of the case was justified

in taking into consideration the size of the plots which were exhibited for the purpose of comparison with the size of the plot acquired, but we are unable to uphold the cut of 40% which has been imposed by the High Court since the acquired lands are already within developed municipal limits and the deduction of 1/4th the market value made by the Reference Court is appropriate and liable to be restored.

In the result the appeals preferred by the claimants are partly allowed and the impugned judgment of the Division Bench of the High Court is set aside and the Award passed by the Reference Court is restored. **(Mohinder Singh and others v. State of Haryana 2014 (5) AWC 5327 SC)**

### **Motor Vehicles Act**

**Contributory negligence-** What is- It proceeds from injured person's actual awareness of risk and failure to take precautions for his own safety. [**Santha vs. Kerala State Electricity Board, 2014 ACJ 2168(Kerala H.C.)**]

**Negligence-Contributory negligence-** Collision between a tractor and motor cycle coming from opposite directions and motorcyclist and two minor children on pillion sustained injuries. Accident occurred in the middle of road and Tribunal presumed that motorcyclist was rash and negligent and found that both the drivers were equally negligent. High Court modified the blame for the motorcyclist and tractor driver to 25:75. Apex Court observed that motorcyclist would have taken sufficient caution since he was travelling with his two minor children. No evidence of negligence on the part of motorcyclist. Apex Court reversed the finding of negligence and held that tractor driver was solely responsible for the accident as he was driving a heavier vehicle. [(2013 ACJ 2141 (SC) followed]. [**Krin vs. Sajjan Singh, 2014 ACJ 2550.(All. H.C.-Lucknow-Bench)**]

**Section 123(c) (2) and 124 –A-** Untoward incident- compensation- Accidental falling of passenger from the train- Passenger travelling by train in upper berth of the compartment due to sudden jerk fell down and sustained fatal injury- Railway Claims Tribunal awarded Rs. 4,00,000.00 – Railway contended that deceased fell down due to his own negligence and the incident does not fall within the ambit and scope of 'untoward incident'- Accidental fall from any part of the compartment is covered by untoward incident and it would be considered as accidental falling from the train- Upper berth is an integral part of the compartment, therefore, if anybody falls down from the upper berth to the floor of the train it would be considered as accidental falling from the train and it would be covered within the definition of untoward incident- Railway adduced no evidence to prove that deceased had not taken due precaution or he fell down due to his overt act- Whether deceased died in an untoward incident and railway are liable- Held: yes. [2003 ACJ 402 (AP), 2009 ACJ 454 (AP), 2011 ACJ 799 (Bombay) and 2008 ACJ 1895 (SC) relied]. [**Union of India vs. Narendra Kumar Gupta, 2014 ACJ 2242. (All. H.C.-Lucknow-Bench)**]

**section 147 (1) (b) (i)**- Motor insurance- Goods vehicle- Gratuitous passenger- Liability of insurance company- Driver lost control of vehicle, it turned turtle resulting in death of 3 passengers claimed that they were travelling along with their goods as owner but they failed to establish the same by producing evidence- Whether the Tribunal was justified in concluding that deceased were gratuitous passengers in goods vehicle and mulcting liability on owner of vehicle exonerating the insurance company. Held- Yes. [**Ram Kumar Awasthi vs. Vimla Rani Chaurasiya, 2014 ACJ 2278.(All. H.C.)**]

**Section 149 (2)- Motor insurance-** Tractor-Agricultural purpose-Liability of insurance company. Tractor driven rashly and negligently dashed against a motor cycle resulting in death of motorcyclist- Insurance company disputes its liability on the ground that tractor was insured for agricultural purpose but it was used for carrying marriage procession- Whether carrying the marriage procession does not come within the purview of agricultural purpose and insurance company is entitled to recovery the compensation amount from the owner of tractor. **Held- yes.[Oriental Insurance Co. Ltd. vs. Vidyawati, 2014 ACJ 2259(All. H.C.)]**

**Fatal accident-**Principles of assessment- Evaluation of gratuitous services of homemaker- Services rendered by a housewife to her family be evaluated at Rs. 3,000 p.m. while computing compensation for her death. [**Ram Kumar Awasthi vs. Vimla Rani Chaurasiya, 2014 ACJ 2278.(All. H.C.)**]

**Fatal accident-** Principles of assessment- Notional income- Determination of National income of each deceased may be fixed at Rs. 3,000 p.m. [**Ram Kumar Awasthi vs. Vimla Rani Chaurasiya, 2014 ACJ 2278(All. H.C.)**]

**Fatal accident-**Principles of assessment- Dependant- Sister-Deceased a bachelor aged 26- Contention that sister of the deceased cannot be considered as dependant for the purpose of awarding compensation- Held: deceased was the only son of his parents and he was sole breadwinner of the family; if deceased had been alive he would have contributed a considerable amount for the marriage of his sister, therefore, sister can be considered as a dependant of her deceased brother. [1987 ACJ 561 (SC) relied]. [**United India Insurance Co. Ltd. Vs. D. Vasanth, 2014 ACJ 2186. (Madras H.C.)**]

**Motor Vehicles Act, 1988, section 169(1) read with U.P. Motor Vehicles Rules, 1998, rule 221- Civil Procedure Code, 1908, section 114 and Order 47, rule 1 and Review-** Claims Tribunal- Powers of- Tribunal Concluded that

offending vehicle was not insured at the time of accident and fastened liability on the owner- Owner filed review petition claiming that vehicle was duly insured and cover note was brought on record through the review petition- Rule 221 of U.P. Motor Vehicles Rules applies some provisions of C.P.C. to summary proceedings before the Tribunal which do not include section 114 or Order 47, rule 1- Review petition was filed annexing documents on the basis of which it was claimed that vehicle was insured and Tribunal had wrongly fastened the liability on owner- If Tribunal had to consider the contention raised in review petition, it has to re-appreciate the evidence which touches the every merit of the case- Whether the Tribunal in absence of any statutory power of review is not competent to review its judgment on merit- Held: yes. [**Hari Krishna Ojha vs. Leelawati and others, 2014 ACJ 2836(All. H.C.-Lucknow Bench)**]

### **Prevention of Food Adulteration Act**

**Ss. 7/16 and 13(2) - Prevention of Food Adulteration, Rules, 1955 – Rule 17(c) – Criminal Procedure Code, 1973 – Section 378 – Sale of adulterated Dal – Conviction - validity of - Delay in dispatch of sample to Central Food Laboratory may vitiate prosecution - Petitioner acquitted of offence of which he has been charged and convicted**

The petitioner was prosecuted on the allegation of violation of provisions of Sections 7/16 of the Prevention of Food Adulteration Act, 1954 and was convicted and sentenced to undergo simple imprisonment for a term of 1 year and to pay a fine of Rs. 1,000 and in default, to undergo further simple imprisonment for 3 months by the learned Chief Judicial Magistrate, Kaithal, vide judgment of conviction dated 18.5.2005 and order of sentence dated 25.5.2005.

A perusal of the record shows that the petitioner moved application for sending second part of the sample to Director, Central Food Laboratory on 24.7.1997 and it was on 6.10.1997 that the learned trial Court ordered despatch of the sample to the Director, Central Food Laboratory. It is evident from the report Ex.PF also that the sample was received by Director, Central Food Laboratory on 13.10.1997 though it was despatched to him vide memorandum No. 14 dated 6.10.1997. Thus, the second part of the sample was sent much after expiry of period of 7 days as prescribed in Rule 17(c).

It is needless to state that Rule 17(c) of the Rules and Sec. 13(2) of the Act have been violated insofar as requisition for sending of second sample was made by the petitioner on 24.7.1997 but the second sample was sent to the

Director, Central Food Laboratory on 16.10.1997 i.e. much after the expiry of the statutory period of 5/7 days.

As a natural consequence, petition is allowed, and petitioner is acquitted of the offence of which he has been charged and convicted. **(Ashok Kumar v. State of Haryana, 2014 FAJ 427 (P&H))**

## **Provincial Small Causes Courts Act**

**Section 18 and 25 of the Provincial Small Causes Courts Act, 1887 – U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) of tenant/petitioner allowed by trial Court as specified.**

This is a tenant's writ petition. The respondent-landlord instituted SCC Suit No. 37 of 2008 on the ground that tenant has committed default in payment of rent. The landlord set up his claim on the ground that monthly rent was Rs. 400/- and the default has been committed by tenant in respect of payment of rent since 01.07.1996. On 23.08.2002 a registered notice was sent but despite that no rent was paid.

The Trial Court while deciding issue no. 2 recorded a finding in favour of tenant that monthly rent was only Rs. 200/- and not Rs. 400/-. Further while considering issue no. 6, it has clearly recorded a finding based on evidence of plaintiff itself that rent used to be paid by tenant but the plaintiff-landlord did not issue any receipt to tenant. Further, tenant has not made any payment of rent from June, 2002. Thereafter it has also been noticed that tenant forwarded rent for the months of October and November 2002 by money-order. Then the Trial Court said that there is no evidence to show that any money-order was tendered for the rent of July, August and September, 2002 and, therefore, there is default. Thereafter the Trial Court proceeded to decide question, whether tenant was entitled for benefit under Section 20(4) of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as the "Act, 1972").

The question of benefit under Section 20(4) of Act, 1972 would arise only when it can be held that tenant is in default i.e. for a period of four months rent has not been paid despite demand vide Section 20(2)(a) of Act, 1972. In the present case the order of Trial Court does not show that it has recorded any finding that tenant was in default of rent for a period of four months. Once Section 20(2)(a) of Act, 1972 itself is not attracted, the suit for eviction on the ground under Section 20(2)(a) has to fail and question of giving benefit of Section 20(4) would not arise at all.

Unfortunately, the Revisional Court has also failed to look into this aspect of the matter and has confined itself to the question, whether tenant was entitled to benefit under Section 20(4) or not though the question of attracting Section 20(4) would arise only when default on the part of tenant for a period of four months is found proved. The basic question has not been found proved and there is no finding by both the courts below on this issue, therefore, the decree of eviction against tenant could not have been passed. The impugned orders are patently illegal and the courts below have committed manifest error of law, therefore, the same are not sustainable. [**Anil Kumar Tyagi v. tara Chand, 2014(3) ARC 525**]

**Sections 18 and 25 of the Provincial Small Causes Courts Act, 1887 – Order VI, Rule 17 and Order XV, Rule 5 of Civil Procedure Code, 1908 – Section 30 of the U.P. Urban Buildings (Regulations of Letting, Rent and Eviction) Act, 1972.**

In *B.K. Narayana Pillai v. Parameswaran Pillai, (2000) 1 SCC 712*, relied upon by the counsel for the revisionist, Supreme Court held that The principles applicable to the amendments of the plaint are equally applicable to the amendments of the written statements. The courts are more generous in allowing the amendment of the written statement as the question of prejudice is less likely to operate in that event. The defendant has a right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment the other side should not be subjected to injustice and that any admission made in favour of the plaintiff is not withdrawn. All amendments of the pleadings should be allowed which are necessary for determination of the real controversies in the suit provided the proposed amendment does not alter or substitute a new cause of action on the basis of which the original lis was raised or defence taken. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts should not be allowed to be incorporated by means of amendment to the pleadings. Proposed amendment should not cause such prejudice to the other side which cannot be compensated by costs. No amendment should be allowed which amounts to or relates (sic results) in defeating a legal right accruing to the opposite party on account of lapse of time. The delay in filing the petition for amendment of the pleadings should be properly compensated by costs and error or mistake which, if not fraudulent, should not be made a ground for rejecting the application for amendment of plaint or written statement.

Now the next question arise as to whether the proposed amendment can be allowed in view of Proviso to Order VI Rule 17 C.P.C. The defendant alleged that the earlier counsel committed negligence in drafting the written

statement. The defendant, being a semi illiterate person, could not know about it. When he engaged new counsel then the defect was noticed. Order VI Rule 17 C.P.C., as amended in the year 2002, is quoted below:-

**"17. Amendment of pleadings.-** The Court may at any stage of the proceedings allow either party to alter or amend his pleading in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

Supreme Court in *Salem Advocate Bar Assn. (II) v. Union of India*, (2005) 6 SCC 344, held that Order 6 Rule 17 of the Code deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it has to be shown that in spite of due diligence, such amendment could not have been sought earlier. The object is to prevent frivolous applications which are filed to delay the trial. There is no illegality in the provision.

The phrase "due diligence" came for consideration before Supreme Court in *Chander Kanta Bansal v. Rajinder Singh Anand*, AIR 2008 SC 2234, in which it has been held that the words "due diligence" have not been defined in the Code. According to Oxford Dictionary (Edn. 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (18th Edn.), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation. According to Words and Phrases by Drain-Dyspnea (Permanent Edn. 13-A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means

reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs.

Supreme Court again in *J. Samuel v. Gattu Mahesh*, (2012) 2 SCC 300, held that due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term "due diligence" is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial. A party requesting a relief stemming out of a claim is required to exercise due diligence and it is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit. In the given facts, there is a clear lack of "due diligence" and the mistake committed certainly does not come within the preview of a typographical error. Similar view was taken in *Vidyabai v. Padma Latha*, (2009) 2 SCC 409, *Sushil Kumar Jain v. Manoj Kumar*, (2009) 14 SCC 38 and *Abdul Rehman v. Mohd. Ruldu*, (2012) 11 SCC 341.

The written statement was drafted by an advocate after reading the plaint. After legal advice, it cannot be said that in exercise of "due diligence" the fact sought to be brought in the pleading by way of amendment was not in the knowledge of the defendant. A distinction has to be drawn between 'due diligence' and 'negligence'. The case of the defendant falls in the category of 'negligence' and not 'due diligence'. Trial Court rightly rejected the amendment application, as Proviso to Order VI Rule 17 C.P.C., now casts a rider on the power of the Court in allowing amendment application. [**Shiv Swarup Gupta v. Rajeev Kumar Rastogi**, 2014(3) ARC 544]

**Sections 18,25 and 17(1) of the Provincial Small Causes Courts Act, 1887 – Order I, Rule 10 read with Order VI, Rule 17 and Order XXII, Rule 4 of Civil Procedure Code, 1908 – Suit for arrears of rent and ejection against tenant (deceased) as represented by petitioner, decreed ex-parte by trial Court in favour of LRs of plaintiff (deceased) – Application of petitioners for amending/adding heirs of opposite parties as specified was rejected by trial Court and revision against it was also dismissed – Writ petition – Legality of – Admittedly, petitioners did not comply with mandatory provisions to Section 17(1) of Act, hence, concurrent findings of Courts below upheld – No interference warranted – Petition dismissed. (Ramesh Kumar & Others v. Additional District Judge, Court No. 2, Faizabad, 2014(3) ARC 601).**

**Section 18, 25 of Provincial Small Causes Courts Act, 1887– Suit for**

**ejection by landlord against tenants from accommodation in dispute, decreed by trial Court.**

**Section 17 and 49 of the Registration Act, 1908 (As amended in U.P.) – Effect of non-registration of documents which required to be registered.**

The issue that the document in question, whether was registrable or not, was not in consideration and so far as sufficiency of stamp duty is concerned, that is not an issue in the present case.

Similarly *Smt. Bidya Devi v. Commissioner Of Income-Tax, AIR 2004 Cal 63* is a Division Bench decision of Calcutta High Court. The Court considered the scope of review and a situation when a matter should be remanded which is not at all an issue helpful for petitioner in the present case.

*Ram Abatar Mahato v. Sm. Shanta Bala Dasi, AIR 1954 Cal 207* is again a Division Bench judgment of Calcutta High Court. The Court said that a document which is a unilateral document is not admissible in evidence as it would satisfy the definition of 'lease' under Act of 1882. The Court found that 'kabuliyat' a unilateral document was for a period of five years and, therefore, it was compulsorily registered under Section 17(1)(d) of Act, 1908. This is evident from para 4 of the judgment which says "in the present case, however, the kabuliyat executed by the lessee was unregistered and there-fore it does not come within the mischief of the third paragraph of Section 107. Accordingly it cannot be said that this kabuliyat is not a lease on the ground that it was not executed by both the lessor and the lessee. If it is a lease, it is a lease for a term exceeding one year because according to the recital which I have already quoted the lessee was taking settlement for a period of five years. It was, therefore, compulsorily registrable under Section 17(1)(d) of the Indian Registration Act.

The aforesaid dictum makes it clear that for the kind of document up for consideration before this Court, registration was not at all compulsory in U.P., since it creates tenancy rights on month to month basis and not for a period of more than 11 months or for any specific period of 11 months. In view thereof the very argument that unregistered document was inadmissible in evidence, has to be rejected as such.

So far as question of non-payment of rent and consequences, is concerned, it is admitted position that no rent has been paid by petitioners and therefore, the concurrent findings recorded by the courts below holding that the petitioners are liable to eviction from suit property, warrants no interference.

[Tahira Begum (Smt.) and others v. Xth A.D.J. and others, 2014(3) ARC 657]

## **Rent Laws**

### **Rejection of impleadment application of co-owner on grant if other Co-owner not impleaded that will not make any legal or otherwise legality of.**

The writ petition is directed against the order dated 4.9.2013 passed by Additional District Judge, Court No. 1, rejecting petitioner's application for impleadment observing that at the best petitioner is in the capacity of co-owner and that being so, his impleadment is neither necessary nor obligatory. It has been held that co-owner himself can institute a suit for eviction of the tenant and if other co-owners are not impleaded, that will not make and legal or otherwise infirmity.

This issue is squarely covered by a Full Bench judgment of this Court in **Gopal Dass and another Vs. Ist Additional District Judge, Varansi and others, 1987(1) ARC 281**, Wherein this Court after considering Rule 15(2) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Rules, 1972 (hereinafter referred to as "Rules, 1972") held as under:

“ So far as the applicability of this Rule to the present case is concerned, there is no problem. Murlidhar Sah who has bought the action for eviction of the premises in question is undoubtedly the landlord. He has signed the application. He alone is competent to sign the application. However, we may point out that the requirement of Rule 15(2) that an application for release of premises owned by co-owners should be signed by all co-owners would be invalid. One co-owner is competent to maintain an action for eviction of the tenant of the entire premises, since he can be considered as a landlord within the meaning of Section 3(i) of the Act. One co-owner alone would be competent to sign such an application.”

The Apex Court in **Ram Paricha** (supra) further observed as under:

“Jurisprudentially, it is not correct to say that a co-owner of a property is not its owner. He owns every part of the composite property along with others and it cannot be said that he is only a part-owner or a fractional owner of the property. The position will change only when partition takes place. It is, therefore, not possible to accept the submission that the plaintiff who is admittedly the landlord and co-owner of the premises is not the owner of the premises... It is not

necessary to establish that the plaintiff is the only owner of the property... as long as he is a co-owner of the property being at same time the acknowledged of the defendants.”

In **Rang Nath V. State of U.P. and others 1984(1) ARC 642** it was held that a suit eviction filed under Section 21 of the Act by one of the co-owner-landlord alone is maintainable.

In view of above, I do not find any infirmity, legal or otherwise, in the order impugned in this writ petition warranting interference. (**Iftexhar Ahmad Siddiqui V. Jai Prakash and Another, (2014 (3) ARC 887)**)

## **Service Laws**

**Compassionate appointment – object of – Purpose and object of compassionate appointment is to enable the members of family of the deceased employee to get support to sustain themselves.**

Repeatedly, it has been held that the purpose and object of compassionate appointment is to enable the members of family of the deceased employee in penury, due to sudden demise of the sole breadwinner, get support and succor to sustain themselves and not to face hardship for their bore sustenance.

Recently a Full Bench of this Court has also have the occasion to took into this aspect of the matter in Shiv Kumar Dubey and others v. State of U.P. and others, 2014(2) ADJ 312: 2014(3) AWC 3006 and has formulated certain principles after considering a catena of authorities on the subject in para 29 of the judgment as under:

“(i) A provision for compassionate appointment is an exception to the principle that there must be an equality of opportunity in matters of public employment. The exception to be constitutionally valid has to be carefully structured and implemented in order to confine compassionate appointment to only those situations which subserve the basic object and purpose which is sought to be achieved:

(ii) There is no general or vested right to compassionate appointment. Compassionate appointment can be claimed only where a scheme or rules provide for such appointment. Where such a provision is made in an administrative scheme or statutory rules, compassionate appointment must fall strictly within the scheme or, as the case may be, the rules;

(iii) The object and purpose of providing compassionate appointment is to enable the dependent members of the family of a deceased employee to tide over the immediate financial crisis caused by the death of the bread-earner:

(iv) In determining as to whether the family is in financial crisis, all relevant aspects must be borne in mind including the income of the family: its liabilities, the terminal benefits received by the family: the age, dependency and marital status of its members, together with the income from any other sources of employment:

(v) Where a long lapse of time has occurred since the date of death of the deceased employee, the sense of immediacy for seeking compassionate appointment would cease to exist and this would be a relevant circumstance which must weigh with the authorities in determining as to whether a case for the grant of compassionate appointment has been made out:

(vi) Rule 5 mandates that ordinarily, an application for compassionate appointment must be made within five years of the date of death of the deceased employee. The power conferred by the first proviso is a discretion to relax the period in a case of undue hardship and for dealing with the case in a just and equitable manner:

(vii) The burden lies on the applicant, where there is a delay in making an application within the period of five years to establish a case on the basis of reasons and a justification supported by documentary and other evidence. It is for the State Government after considering all the facts to take an appropriate decision. The power to relax is in the nature of an exception and is conditioned by the existence of objective considerations to the satisfaction of the Government:

(viii) Provisions for the grant of compassionate appointment do not constitute a reservation of a post in favour of a member of the family of the deceased employee. Hence, there is no general right which can be asserted to the effect that a member of the family who was a minor at the time of death would be entitled to claim compassionate appointment upon attaining majority. Where the rules provide for a period of time within which an application has to be made, the operation of the rule is not suspended during the minority of member of the family.”

Looking to the entire factual matrix of this case in the light of exposition of law discussed above. It cannot be said that petitioner is

entitled to obtain a writ of mandamus commanding the respondents to provide him compassionate appointment. [**Ram Autar Singh v. U.P. Power Corporation Ltd. Electricity Distribution, Bulandshahr and another, 2014(6) AWC 5503**]

**Seniority—Whether the petitioner is entitled for seniority as per the select list of the examination held on 5.9.1990 or he is entitled for seniority only on the basis of his regularization dtd. 31.7.1995?—Determination of—Petitioner entitled for his due seniority in accordance with the select list and for all consequential benefits**

Indisputably, under the facts and circumstances of the case, the respondent authorities were fully aware of the fact that the petitioner would have exercised his option either accepting the regularization or keeping his claim on the basis of the select list of the examination held on 5.9.1990 and no such opportunity was ever given to the petitioner thus the petitioner was put to lessor advantageous position without providing any opportunity of hearing or to exercise his claim on the basis of select list of 1990. It is very natural that no person would exercise his option to accept disadvantageous position as petitioner has rightly protested in his representation dated 6.10.1995, Annexure-3 to the counter-affidavit. Thus, clearly the respondent authority No.2 had acted in some what most unreasonable, unjust, arbitrary and illegal manner.

The issue involved in the present petition is entirely different as the petitioner in the present case is claiming his right to be senior on the basis of select list of the examination held on 5.9.1990, wherein he stood first and that he never agreed to be regularized on the basis of his working as an interim measure on ad hoc basis.

In Court's opinion, the impugned order is not sustainable and order, rejecting the claim of seniority made by the petitioner on the basis of seniority list of 1990, is liable to be rejected, inasmuch as, the petitioner had never surrendered his claim on the basis of select list of year 1990 and it also seems to be highly unreasonable, unjust and arbitrary on the part of respondent No.2 to regularize the service of the petitioner on 31.7.1995 and on 31.7.1995 itself declare the result of the examination held on 5.9.1990 for the purpose of appointment and thus on the same day putting the petitioner on disadvantageous position. The undisputed fact remains that the petitioner had filed representation on 6.10.1995 categorically assailing that he had never surrendered his claim on the basis of the select list of 1990 and he had never opted or prayed for regularization as paid apprentice on the basis of working as ad hoc employee which was based on judgement of this Court dated 24.3.1994. Thus, in Court's opinion, the petitioner has been illegally deprived of his seniority for which he is fully entitled on the basis of select list for the examination held on 5.9.1990, wherein the petitioner had secured highest 195 marks and stood first. **[Rajesh Kumar Upadhyay vs. Hon'ble High Court of**

**Judicature at Allahabad & Others, 2014 (3) ESC 1849 (All)]**

**Compassionate appointment—Presumption of death—Employee declared dead by civil court on the ground of not known for seven years—Presumption drawn by court with regard to death, seems to be not incorrect, hence be entitled for compassionate appointment**

Provisions contained in Section 107 and 108 read with Section 56 of Indian Evidence Act dealt with the public interest and for welfare of people. Any presumption drawn, which go against the spirit of Section 107 and 108 of Indian Evidence Act, shall not be correct. Ordinarily, in case it is found that a person is missing for more than seven years, then the statutory provisions under Section 107 and 108 should be given effect. The right flowing from statutory provisions may not be taken away on a presumption based on unfounded ground. What will happen in due course of time in case statutory provision is implemented affects adversely should be looked into by the Legislature and not by the Courts.

Learned counsel for the respondent has relied upon a Division Bench judgement of this Court in the case in Ramakant Singh vs. State of U.P. and others, **2011(4) ADJ 874 (DB) : 2011 (4) ESC 2476 (All)(DB)**, wherein it has been held that even if no suit is filed, presumption may be drawn with regard to civil death.

In Ajay Kumar Tewari vs. Dy. Inspector General of Police (Establishment) Police Headquarter, U.P., Allahabad, and others, **2005 (5) ESC 67 (All)** [delivered by one of us (Hon'ble Sunil Ambwani, J)], it has been held that the provision of Section 108 of Evidence Act would be applied for claiming compassionate appointment.

For the reasons discussed hereinabove, the presumption drawn by the Hon'ble Single Judge with regard to death of Om Prakash, seems to be not incorrect. Rather, it is based on sound principles of law. Accordingly, the impugned judgment and order passed by the Hon'ble Single Judge does not seem to suffer from any infirmity or illegality.

In view of the above, the appellant shall appoint the respondent on compassionate ground expeditiously. [**District Judge Hardoi vs. Saurabh Kumar, 2014 (4) ESC 1873 (All)(DB)(LB)**]

**Dismissal- Respondent workmen was dismissed on security guards, involved in agitation and creating nuisance-Labour Court set aside order and directed instatement with full back wages- Reinstatement cannot be order in case where the employer has abused has established lose of**

**confidence.**

Once it is held that the Labour Court had no jurisdiction to hear the matter, there was no occasion for the Labour Court to give a finding on merits regarding validity of strike dated 1.12.2005. If the Court had no jurisdiction to try the matter, it had no jurisdiction to deal with merits of the matter. Thus, the finding regarding issue No. 3 by the Labour Court is of no assistance to the workman. Apart from this, the Additional District Judge, Gohad in his order dated 17.7.2009 decided the issue Nos. 1 and 2 against the workman. In no uncertain terms, a finding is given that the workman has interrupted the functioning and production of the factory on 1.12.2005. The Labour Court has no considered this relevant material at all. Thus, the findings of the Labour Court are perverse in nature and based on irrelevant considerations.

In clear that reinstatement cannot be ordered in cases where the employer has established the bona fide loss of confidence. The employer has abused his position and committed the act which resulted into forfeiting the confidence of employer. Continuance of such employer in service would be embarrassing and inconvenient to the employer. It will be detrimental to the discipline and security of the establishment.

The employes has successfully established the objective facts on the basis of which “loss of confidence” is pleaded. For this reason also, the award of the Labour Court is liable to be interfered with. The Labour Court has not dealt with the stand of the employer regarding loss of confidence. **(Cromption Greaves Ltd. V. Sharad Maheshwari and another, (2014 (143) FLR 908) Madhya Pradesh High Court-Gwalior Bench)**

**Constitution of India, Article 16 and 226- Punjab Civil Services Rules (Vol. 1), Rule 4.9- Adhoc Service -Counting of**

Having been selected by the Subordinate Services Selection Board, Haryana, the petitioner had joined as a Clerk on 30.9.1974 in Rehabilitation Department against a regular post, and on regular basis. Prior to his joining in the respondent-department, the petitioner had worked for different durations in different departments. He had made a number of representations to the respondents for counting of his ad-hoc service rendered earlier in different departments of the respondent-State for the purpose of grant of increments. Representations dated 11.3.1991 and 21.3.1995 (Annexure P-3 and P-4 respectively) of the petitioner, were rejected vide order dated 23.5.1995 (Annexure P-5). Despite issuance of legal notice dated 20.7.1995 (Annexure P-6), the respondents did not move which resulted in filing of this writ petition by the petitioner. The petitioner seeks quashing of order dated 23.5.1995

(Annexure P-5) and directions to the respondents to count his service rendered on adhoc basis.

There is no dispute that if period of adhoc service had gone beyond six months, Subordinate Selection Board was taken into confidence by employers of the petitioner. Communication in this respect was made though with delay but it was not favourably considered by the said Board. Merely because Subordinate Selection Board had not given approval of adhoc service rendered by the petitioner beyond six months as detailed at serial No.3 in para 6 earlier, the petitioner cannot be blamed for this and that too to his prejudice because he is not at fault.

Even for purpose of pension etc., adhoc service rendered by a regular employee preceding his regular appointment, is to be counted is a proposition of no dispute. At this stage, it would be appropriate to refer to a Division Bench judgment of this court in Hanumant Singh and others Versus State of Haryana and others 2008 (4) RSJ 756 and a recent decision rendered by another Division Bench of this Court in CWP No.11212 of 1995 decided on 3.7.2013 in case Suresh Kumar Gupta and others Vs. State of Haryana and others wherein dispute of counting of adhoc service rendered by various petitioners prior to their regularization has been settled and credit for pay fixation etc. have been given. To the same effect are Shanno Devi vs. State of Haryana and others 2013(2) PLR 773 (P&H) and Hardip Singh and another Vs. State of Punjab and others 2004(2) SLR 95 (DB) (P&H) and a recent decision of this Court in CWP No.2554 of 1995 decided on 16.8.2013 titled Neelam Rani and others v. State of Haryana and others.

In view of the above facts and circumstances and the law cited on the subject, service rendered on adhoc basis by the petitioner prior to joining the respondent-department is to be counted for grant of benefit of increments and ultimately of pension etc. (**Megh Raj v. State of Haryana and another, 2014 (6) SLR 162 (P & H)**)

### **Specific Reliefs Act**

**Section 28 of the Specific Relief Act, 1963 – Contract for sale – It was held that the orders of the Execution Court as well as Revisional Court need no interference as the petitioner himself had not taken permission from the prescribed authority as per the terms of the decree – Execution Court directed to proceed and satisfy the decree without granting adjournments to either of the parties – Writ petition dismissed.**

The learned counsel for the petitioner relied upon decision of Hon'ble Supreme Court in the case of *Vishwa Nath Sharma v. Shyam Shanker Goela*

*and another (2007) 10 SCC 595* by which it has been held that for grant of decree of specific performance, it is not dependent upon the permission by any authority . In the present case, it is not the case that the decree is dependent upon permission of the Prescribed Authority as a specific issue No.7 has been framed with regard to the aforesaid and has been decided against the defendant. The Supreme Courtyy in the aforesaid decision in para 12 has held that if the Chief Commissioner ultimately refused to grant the sanction to the sale, plaintiff will not be able to enforce the decree of specific performance of contract but that was not a bar upon the court passing a decree for that relief. If after the grant of the decree of specific performance of the contract, the Land and Development Officer refused to grant permission for sale, the decree holder may not be in a position to enforce the decree but it cannot be held that such a permission is a condition precedent for passing a decree for specific performance of the contract. The question in the present case is not that the court is bound by the condition precedent , that is, obtaining permission by the Prescribed Authority under section 157-A of the U.P.Zamindari Abolition and Land Reforms Act. The decree has been passed with the condition that the petitioner after permission from the Prescribed Authority would execute the sale deed after receipt of the balance amount; as such the said decision is not applicable on the facts of the present case.

It is not disputed that till date permission has not even been sought by the petitioner as directed in the judgment and decree dated 25.5.1993. On the other hand, the plaintiff respondents No.1 and 2 have already tendered the balance amount on 2.3.2005, as such it cannot be said that the respondents have not complied the direction in the decree whereas the petitioners have clearly not complied with the direction of the courts below for obtaining permission under section 157-A of the U.P. Zamindari Abolition and Land Reforms Act.

In view of the discussion above, I am not inclined to interfere with the orders of the executing court as well as the Revisional Court and it is further directed that the execution be proceeded and the decree be satisfied without granting adjournment to either of the parties.

The writ petition is accordingly dismissed. [**Dal Chand v. Pradeep Kumar, 2014(32) LCD 2141 (All.)**]

**S. 34 Proviso- Suit for declaration- Bar to suit- If the plaintiff is not in possession, a suit for mere declaration would not be maintainable-The appellants/plaintiffs had to necessarily claim the consequential relief of possession of the property.**

This is an Appeal against the order of the Civil Judge (Senior Division), Kanpur

Nagar, dated 2<sup>nd</sup> August, 2014 by which the Suit No. 107/14, filed by the appellants, under Order VII, Rule 11 of the Code of Civil Procedure (In short "CPC"), has been rejected on the ground that the suit for declaration without seeking the relief of possession is not maintainable.

We do not find any error in the impugned order. The relief sought in the plaint has been referred hereinabove. The admitted fact is that the appellants were not in possession of one of the shops on the ground floor and the other on the first floor of the house in dispute, while the decree of declaration was being sought to declare the appellants as the sole and exclusive owners of the house No. 117/193/I, block, Navin Nagar, Kanpur Nagar, without seeking the relief of possession of those portions of the house which were not in the possession of the appellants.

In the case of Mehar Chandra Das v. Lal Babu Siddiqui, reported in (2007) 14 SCC 253: (AIR 2007 SC 1499), the Apex Court held as follows:

"1. The appellant defendant, therefore, had been in possession of the suit property. In that view of the matter the respondent-plaintiffs could seek for further relief other than for a decree of mere declaration of title.

"2. The High Court, in our opinion, committed a manifest error in not relying on the decision of this Court in Vinay Krishna. The said decision categorically lays down the law that if the plaintiff had been in possession, then a suit for mere declaration would be maintainable; the logical corollary whereof would be that if the plaintiff is not in possession, a suit for mere declaration would not be maintainable."

It is evident that the suit filed by the appellants/plaintiffs was not maintainable, as they did not claim consequential relief. The respondent of the suit property, the appellants/plaintiffs had to necessarily claim the consequential relief of possession of the property. Such a plea was taken by the respondents/defendants while filing the written statement. The appellants/plaintiffs did not make any attempt to amend the plaint at this stage, or even at a later stage. The declaration sought by the appellants/plaintiffs was not in the nature of a relief. A worshiper may seek that a decree between the two parties is not binding on the deity, as mere declaration can protect the interest of the deity. The relief sought therein was for the benefit of the appellants/plaintiffs themselves.

As a consequence, the appeals lack merit and, are accordingly dismissed. There is no order as to costs."

In view of the law laid down by the Apex Court, we are of the view that the Trial court has not committed any error in rejecting the suit as barred by Section 34 of

the Specific Relief Act. The appellants are not remedy less. It is open to them to file a fresh suit, as provided under Order VII, Rule 11 of the CPC.

In view of what has been discussed above, in the result, the Appeal, being devoid of merits, fails and is dismissed. [**Smt. Rekha Mishra & another vs. Shiv Prasad Srivastava & others, 2014 (6) ALJ 797**]

## **Transfer of Property Act**

**Section 3 of Transfer of Property Act, 1882 – Section 63 of Succession Act, 1925 – Section 68 of Evidence Act 1872 – Attestation and execution of the Will - It was held that the attesting witness should speak not only about the testator's signature or affixing his mark to the will but also that each of the witnesses had signed the will in the presence of the testator.**

A three Hon'ble Judges Bench of Supreme Court in *Yunnam Ongbi Tampha Ibema Devi v. Yunnam Joykumar Singh*, (2009) 4 SCC 780, after reviewing earlier judgments held that as per provisions of Section 63 of the Succession Act, for the due execution of a will:

- (1) The testator should sign or affix his mark to the will;
- (2) The signature or the mark of the testator should be so placed that it should appear that it was intended thereby to give effect to the writing as a will;
- (3) The will should be attested by two or more witnesses, and
- (4) Each of the said witnesses must have seen the testator signing or affixing his mark to the will and each of them should sign the will in the presence of the testator.

The attestation of the will in the manner stated above is not an empty formality. It means signing a document for the purpose of testifying of the signatures of the executants. The attested (sic attesting) witness should put his signature on the will *animo attestandi*. It is not necessary that more than one witness be present at the same time and no particular form of attestation is necessary. Since a will is required by law to be attested, its execution has to be proved in the manner laid down in the section and the Evidence Act which requires that at least one attesting witness has to be examined for the purpose of proving the execution of such a document.

Therefore, having regard to the provisions of Section 68 of the Evidence Act and Section 63 of the Succession Act, a will to be valid should be attested by two or more witnesses in the manner provided therein and the propounder thereof should examine one attesting witness to prove the will. The attesting witness should speak not only about the testator's signature or affixing his mark to the will but also that each of the witnesses had signed the will in the presence of the testator. [**Daya Shanker Singh v. DDC, 2014(32) LCD 2167**]

**S. 108(p)- Word “permanent”- A structure that last till end of tenancy can be treated as a permanent structure.**

Supreme Court in Purushottam Das Bangur v. Dayanand Gupta, (2012) 10 SCC 409, held that no hard-and-fast rule can be prescribed for determining what is permanent or what is not. The use of the word “permanent” in Section 108(p) of the Transfer of Property Act, 1882 is meant to distinguish the structure from what is temporary. The term “permanent” does not mean that the structure must last forever. A structure that lasts till the end of the tenancy can be treated as a permanent structure. The intention of the party putting up the structure is important for determining whether it is permanent or temporary. The nature and extent of the structure is similarly an important circumstance for deciding whether the structure is permanent or temporary within the meaning of Section 108(p) of the Act. Removability of the structure without causing any damage to the building is yet another test that can be applied while deciding the nature of the structure. So also the durability of the structure and the material used for erection of the same will help in deciding whether the structure is permanent or temporary. Lastly, the purpose for which the structure is intended is also an important factor that cannot be ignored. Applying the above tests to the instant case the structure was not a temporary structure by any means.

The Courts below concurrently held that the petitioner has raised permanent construction, making material alteration in the shop in dispute without any authority and consent of the landlord, due to which shop in dispute was disfigured which also reduced its utility. The concurrent finding of facts recorded by two court below cannot be interfered by this Court. (**Mahendra Kumar v. Parasram Ram Goel and 11 Ors, 2014 (3) ARC 852**)

**U.P. Consolidation of Holding Act**

**Section 6(1) of the U.P. Consolidation of Holdings Act, 1953 It was held that the issuance of notification under Section 6(1) of the Act, 1953 is not a policy decision but a conditional legislation, hence, not open to judicial review. Reiterated that the State is under no obligation to record reasons for exercising its legislative powers in a particular manner.**

**U.P. Consolidation of Holdings Act, 1953, Section 6(2) – Orders of Consolidation Authorities. It was held that all matters attained finality prior to issuance of notification under Section 6(1) of the Act, 1973 are saved under the provisions of Section 6(2) of the Act, 1953**

The primary and most strident contention of the counsel for the petitioners is that the consolidation operations have been continuing for a

sufficiently long period of time and have reached a very advanced stage or have been virtually completed. Even chak revisions have been finalized, possession over the chaks carved out have been handed over to the respective tenure holders, chak roads and chak guls have been constructed and only the final records are in various stages of finalization. On the strength of these facts it is contended that all these actions taken shall come undone if the impugned notifications are not quashed. This contention though attractive, in fact, works against the petitioners themselves because it is specifically provided in Section 6(2) of the Act that by issuance of notification canceling consolidation operations the provisions of the said Act will cease to apply to the are governed by the notification under section 4, subject to what has already attained finality. It is therefore clear from a bare reading of provision itself that all matters that have attained finality prior to the issuance of notification under Section 6(1) are saved and therefore this contention lacks substance.

The other submissions that the basis of the issuance of notification under Section 6 being a single case or that only a small percentage of the land in the unit is fit for agriculture or that consolidation operations which were notified for the first time in the unit and have been cancelled midway entail factual controversies which cannot be addressed or decided in a writ petition. It is settled law that disputed question of fact cannot be decided by the writ Court. Even otherwise, the Division Bench has held that the issuance of notification under Section 6 is conditional legislation and the State is under no obligation to record reasons for exercising its legislative powers in a particular way. Moreover, since the power to issue a notification cancelling consolidation operations has been held to be a legislative function and the notification itself has been held to be conditional legislation, the same can be challenged only on the grounds on which any legislation can be challenged as has been laid down by the Division Bench in the case of Agricultural and Industrial Syndicate, which is binding this Court. Also, therefore, the petitioners reliance upon the decision of the Apex Court in the case of Ashoka Smokeless Coal is of no avail as therein it has been held that a policy decision is open to judicial review but issuance of a notification under section 6(1) of the Consolidation of Holdings Act is not a policy decision but conditional legislation.

During the course of arguments, repeated queries by the Court to each and every counsel who appeared for the petitioners as to what specific injury was caused to the petitioners which had prompted them to challenge the notification, the persistent refrain was that the consolidation operations had been in progress for a sufficiently long period of time and the petitioners were given to understand that as a result of the impugned notifications all

proceedings that had taken place till the time the consolidation operations were cancelled, would be set at naught. Apart from the aforesaid, no other specific injury could be pointed out by various counsel, who have made submissions for quashing the impugned notification. When confronted with the provisions as contained in sub section (2) of the Section 6, some of the counsel conceded that they would be satisfied if the writ petition were disposed of with an appropriate observations regarding the provisions as contained in sub section (2) of section 6. This aspect of the matter has already been dealt with herein above. Section 6(2) provides that on issuance of an notification 6(1) of the Act, the unit would cease to be under consolidation operations with effect from the date of notification “subject to the final orders relating to the correction of land records, if any, passed on or before the such notification.” The contention that the notifications under Sections 6(1) are policy decisions was pleaded on behalf of the State in earlier petitions wherein similar notifications have been challenged. It was held therein that the notifications under Section 4 or under Section 6(1) of the Act are not policy decisions but are conditional legislation. It would be relevant to elaborate on the term ‘conditional legislation’ as used in various decision by this Court. The Act, a complete code in itself, provides the procedure and conditions for issuing the notifications. The Government or its delegate, on the basis of its subjective satisfaction, only enforces the provisions in a particular area or unit, hence the term conditional legislation. **[Raja Ram Ojha v. Consolidation Commissioner, 2014(32) LCD 2157]**

**Ss. 48, 20 and 9 – Allotment of chole – Effecting partition – only in proceeding u/s. 9 of above Act partition could be effected, the consolidation authorities have no power to effect partition of chak.**

The petitioners have filed this writ petition challenging the order dated 27.2.1993 passed by the Deputy Director of Consolidation, Azamgarh (for short, D.D.C.). In Revision No.1049 under Section 48 of the U.P. Consolidation of Holdings Act (for short, the C.H.Act), arising out of the proceedings under Section 20 of the Act for allotment of chaks. the revision was preferred against the order passed in the appeal filed by Gauri Shankar, contesting respondent No. 2, which was partly allowed vide order dated 7.10.1989.

In case no partition is sought under Section 9 of the Act, the bar imposed by Section 11A will come into operation and such a claim at a subsequent stage will not be maintainable. It, therefore, logically follows that a Claim for partition cannot be entertained at the stage of proceedings for allotment of chaks subsequent to the preparation of the Provisional

Consolidation Scheme as provided under Section 19A and its publication as provided under Section 20(1). Objections at this stage can be filed only against the Provisional Consolidation Scheme which are disposed of as provided under Section 21(1), which orders are subject to an appeal under Section 21(2), and thereafter revision under Section 48(1) of the Act.

Thus, from the perusal of the aforesaid provisions and the scheme of the Act itself, it is abundantly clear that the partition can be effected only in proceedings under Section 9 of the Act, which proceedings are admittedly pending before the Consolidation Officer. The D.D.C., therefore, erred in effecting partition in the revision arising out of the proceedings for allotment of chaks which arise out of an objection under Section 20 of the Act. The order impugned, therefore, is unsustainable and is liable to be quashed. [**Mangal through his L.Rs. and another v. Deputy Director of Consolidation, Azamgarh and another, 2014(6) AWC 5662**]

### **U.P. Government Servants Seniority Rules**

**Rule 18- Promotion –It is trite that retrospective promotions are always made w.e.f. “a particular date” and not w.e.f. “a particular year”**

It is trite that retrospective, promotions are always made w.e.f. “a particular date” and not w.e.f. “a particular year”. (**State of U.P. and another v. Girish Chandra Upadhyay and another 2014 (5) AWC 5163** )

### **U.P. Public Moneys (Recovery of Dues) Act**

**Recovery of money – Issuance of recover certificate under provisions of U.P. Public Moneys (Recovery of dues) Act, 1972 is contrary to law and not sustainable.**

The present writ petition has been filed challenging the recovery certificate dated 14.10.2010 issued by the Assistant Collector II- Grade Jagadhri under the provisions of U.P. Public Moneys (Recovery of Dues) Act, 1972.

The crux of the submission is that the recovery since is of more than Rs.10 lacs, therefore, in view of the law laid down by the Apex Court in Unique Butyle Tube Industries (P) Ltd. vs. U.P. Financial Corporation and others reported in (2003) 2 SCC 455, the recovery initiated under the U.P. Public Moneys (Recovery of Dues) Act, 1972 (hereinafter referred to as 1972 Act) is without jurisdiction and the dues could only be recovered by resorting to

provisions of the State Financial Corporations Act, 1951 (hereinafter referred to as 1951 Act) or the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as 1993 Act).

It is clear that the recovery in the present case since is for an amount exceeding Rs.10 lacs therefore, it could be resorted to only under the provisions of the Act 1993 or the enactment protected by virtue of section 34(2) therein, which includes the 1951 Act, but omits the 1972 Act. The impugned recovery certificate issued under the 1972 Act, therefore, is contrary to law and cannot be sustained. Consequently, the writ petition succeeds and is allowed. The impugned recovery proceedings pursuant to recovery citation dated 14.10.2010 initiated under the 1972 Act are set aside. However, it will be open for the respondent corporation to proceed in accordance with law under the Act 1993 or State Financial Corporation Act, 1951, which may be available to it. [**Man Mohan Rai v. U.P. Financial Corporation and others, 2014(6) AWC 5498**]

## **U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act**

### **S. 3(g)-Family – whether includes brother- Consideration of**

It is contended that ‘brother’ is not included in the definition of ‘family’ under Section 3(g) of Uttar Pradesh buildings (Regulation of letting, Rent and Eviction) Act, 1972 (hereinafter referred to as “Act, 1972”) but Provisional Court, in a wholly illegal and unauthorized manner, has held that ‘brother’ is also included within the term ‘family’ since accommodation in question is a non residential and has, therefore, passed the impugned order dated 24.7.2007, which is wholly illegal.

The definition of family under Section 3(g) of Act, 1972. Reads as under: “family” in relation to a landlord or tenant of a building, means, his/her-

- (i) Spouse,
- (ii) Male lineal descendants,
- (iii) Such parents grant-parents and any unmarried or widowed or divorced or judicially separated daughter or daughter or a male lineal descendant, as may have been normally residing with him or her, and includes, in relation to a landlord, any female having a legal right of residence in that building.”

Perusal thereof shows that neither there is distinction in definition of ‘family’ vis a vis residential or non residential building nor it included

‘brother’.

Counsel for the respondent drew my attention to Section 3(a) of Act, 1972 which defines tenant and reads as under:

“tenant”, in relation to a building, means a person by whom its rent is payable and on the tenant’s death-

- (1) In the case of a residential building, such only of his heirs as normally resided with him in the building at the time of his death;
- (2) In the case of a non-residential building, his heirs:

Explanation- An occupant of a room in a hotel or a lodging house shall not be deemed to be a tenant.”

Therein also, I find that in case of non residential building, the term ‘tenant’ include his heirs after the death of original tenant i.e. his widow, daughter or sons or any of them who is alive. “Brother’ will not be heir or representative of such deceased tenant and therefore, Section 3(a) of Act, 1972 also does not come into picture in the case in hand by any stretch of imagination. The impugned order therefore, is patently illegal. (**Smt. Ram Dulari v. Yogya Mohan,(2014 (3) ARC 815)**)

**S. 20(4)-Date of first hearing- Determination- When with the permission of the court – written statement is filed in a case – then no date prior to that can be taken as first date of hearing**

In this case revisional court decided the matter against the tenant the following two grounds:

1- After institution of the suit, summons was issued to the defendant fixing 11.11.1979 which was served on defendant petitioner. The petitioner sought and was granted adjournment to file written statement four or five times. The last adjournment was granted on 01.10.1980 on which date suit was adjourned to 06.11.1980. On 06.11.1980 the defendant petitioner deposited the amount. The Revisional Court held that 11.11.1979 would be deemed to be first date of hearing and five adjournments taken by the defendant petitioner thereafter would not extend the date of first hearing. The trial court had held that 06.11.1980 was the date of first hearing. Defendant petitioner filed written statement on 06.11.1980 which was taken on record.

The revisional court on the basis of Full Bench authority of this court reported in *Siya Ram v. D.J.* 1984(1) ARC 410: (1985 All LJ 1106), held that 11.11.1979 being the first date mentioned in the summons would be the date of first hearing.

2- Revisional Court held that tenant indicated that he had paid Rs. 900 to the Nagar Nigam as municipal taxes payable by the landlord as he was compelled to do so by municipal corporation hence he had deducted the said amount from the rent due, and after deduction of said amount of Rs. 900 he had deposited Rs. 4015/- on 06.11.1980. The revisional court held that such deduction was not permissible as water tax was payable over and above the rent by the tenant by virtue of Section 7 of the Act.

From January 1975 till October 1980 there are 70 months, rent at the rate of Rs. 50/- per month for 70 months comes to Rs. 3500/- however under Section 20(4) of the Act amount of cost and interest is also to be deposited.

As far as the first point is concerned, after discussing the following five authorities of the Supreme Court I have held in K.K. Gupta v. A.D.J. 2004 (2) ARC 659: (2005 All LJ 893) that in case the written statement is filed with the permission of the court then no date prior to that can be taken as first date of hearing:

1. Siraj Ahmad Siddiqui v. P.N. Kapoor, AIR 1993 SC 2525: 1993(2) ARC 451: (1993 All LJ 1250).
2. Advaitanand v. J.S.C.C., 1995 (3) SCC 407: 1995(1) ARC 563: (1995 All LJ 1151).
3. Sudarshan Devi v. Sushila Devi, AIR 1999 SC 3688: 1999(2) ARC. 668: (1999 All LJ 2394).
4. Man Chand Pal v. Shanti Agarwal, AIR 2002 SC 955: 2002 (1) ARC 370: (2002 All LJ 590).
5. Ashok Kumar v. Rishi Ram, AIR 2000 SC 2520: 2002 (2) ARC 160: (2002 All LJ 1818).

In the aforesaid second authority of Advaitanand (1995 All LJ 1151) (1995) the aforesaid Full Bench of Siya Ram (1985 All LJ 1106) (1984) relied upon by the Lower Revisional Court was overruled.

Accordingly the view of the revisional court that it was not 06.11.1980 but 11.11.1979 which was the date of first hearing is against the above authorities of the Supreme Court

As far as second point is concerned, municipal taxes do not mean only water tax it basically mean house tax. Normally water tax at 7% of annual value is levied. Accordingly Rs. 900/- would have been the proportionate water tax at the rent of about Rs. 13,000/-. Accordingly amount of Rs. 900/- could not be only water tax it must have been either house tax or both house tax and water tax. The petitioner was entitled to realize from the landlord the amount of house

tax paid by him (tenant) by virtue of section 179 of U.P. Nagar Mahapalika Adhiniyam. Tenant had also asserted that for non payment of municipal taxes by the landlord, the rent had been attached.

Accordingly I find that both the points were wrongly decided by the revisional court against the tenant.

Writ petition is therefore allowed, judgment and order passed by the lower revisional court is set aside, judgment and decree passed by the trial court dismissing the suit is restored. [**Lal Bahadur v. Addl, Distt. Judge, Lucknow and others, 2014 (5) ALJ 246**]

### **S. 21 (1)(a)- Subsequent event- Consideration of**

In my view whatever has been said to be the alleged subsequent event do not constitute a fact which may have any substantial consequence in the matter. What actually is being said is that during pendency of matter the son of landlord has started his own dental clinic in a portion of his uncle's house with his permission. This kind of engagement or arrangement by landlord's son by himself during long pendency of release application cannot be equated with the fact that landlord's need has extinguished or disappeared since he has got an alternative accommodation and is already engaged therewith which was his basic reason for filing release application. Firstly, the residential accommodation cannot be treated to be converted in commercial accommodation and secondly, if a temporary permission is granted by a relative, that does not mean that landlord has got suitable accommodation for all times to come to continue his vocation therein. (**Vidyawati Asthana & 2 Others v. The Additional District Judge & 3 Others, (2014 (3) ARC 820**)

**Section 21(8) – Enhancement of rent – Application for condonation of delay for a period of 543 days taking plea of lack of knowledge of ex-parte order, in filling Appeal, was rejected. It was held that such an order was not sustainable as the order has been passed ex-parte, without affording opportunity of hearing to the D.G.C. (Civil) – Matter remanded for taking decision afresh – Writ Petition allowed.**

**Section 5 of Limitation Act, 1963 – Condonation of delay of 543 days – It was held that no presumption can be drawn about the service of notice unless the same were returned with endorsement of refusal and it has come on record that notices not returned unserved or the acknowledgments not received back.**

The maxim *DIES DOMINICUS NON EAST JURIDICUS* means Sunday is not a day for judicial or legal proceedings. It is a day which has been

reserved for divine service from times immemorial. Therefore, as of practice ordinarily no judicial work or act is done on Sundays though ministerial acts may be performed or the law makers may occasionally sit and make laws even on Sundays. The above practice in principle has always been, and still is, law except, if otherwise provided by the Statute.

The above principal is not absolute and may not be applicable to the extraordinary jurisdiction exercised by the courts for protection of the fundamental rights of the citizens or any other legal right. It may also not apply where the courts for reasons to be recorded are of the view that any delay on its part would defeat the interest of justice.

Thus, the order dated 17.9.1995 passed by the Rent Control and Eviction Officer can not stand in law for a minute, more so, as it has been passed without hearing the DGC (Civil). It is admitted that the case was heard in part on 15.9.1995 and was posted before the Lok Adalat for hearing on 17.9.1995 without any information to the petitioners or to the DGC (Civil) with the oral instructions to inform him. There is nothing on record to establish that any information in this regard was submitted to the petitioners or to the DGC (Civil). Petitioners or the DGC (Civil) on the first hand had no information of the case being fixed for 17.9.1995 before the Lok Adalat and even if it is presumed for a minute that they had knowledge of it they were not expected to appear in judicial proceedings on the said date which happened to be a Sunday.

The reasoning given by the appellate court in rejecting the application that the petitioners had knowledge of the order dated 17.9.1995 prior to the alleged date on 21.2.1997 is based upon notice alleged to have been given by respondent no. 3. It appears that after the application under Section 21 (8) of the Act was allowed on 17.9.1995, the respondent no. 3 had sent notice dated 1.2.1996 under Section 80 CPC by registered post to the District Magistrate, Firozabad, SSP Firozabad and to the Ministry of Home, Lucknow for the purposes of filing a suit for recovery of enhanced rate.

The appellate court on the basis of the said notice inferred that the petitioners had notice of the order dated 17.9.1995. However, there is no material to prove that the aforesaid notices were ever served upon either of the parties. The service of the said notices was presumed as the petitioners had not rebutted the allegation of the notice being sent by registered post. No such presumption could have been drawn unless notices so sent were returned with the endorsement of refusal or like or until and unless it has come on record that the notices were not returned unserved and the acknowledgments have not been received back. There is nothing of this kind on record or in the findings of the

appellate court.

In view of the above, the appellate court committed an error in presuming the service of the said notices upon the petitioners and thus attributing knowledge of the order dated 17.9.1995 to them. [**State of U.P. v. 1<sup>st</sup> Addl. District Judge, 2014(32) LCD 2114 (All.)**]

### **U.P.Z.A. and L.R. Act**

**S. 299 B –CPC, Order IX, Rule 13- Suit for declaration of right –Decree exparte- summon found to have not been served upon defendants and not sent through post –In absence of service of summons exparte decree held to have rightly set aside**

The writ petition has been filed for quashing the order of Board of Revenue U.P. dated 20.02.2014, arising out of suit for declaration of rights under Section 229-B of U.P. Zamindari Abolition and Land Reforms Act, 1950

In this case, summons were not sent through registered post as such the presumption under Section 114 Illustration (f) of the Evidence Act, 1872 and Section 27 of General Clauses Act, 1897 cannot be raised. The Process Server made endorsement on the duplicate summon that Ram Pal had refused to take summons issued by the Court in presence of two witnesses thereafter one copy of summon was pasted on his door. Ram Pal filed his affidavit and denied service of summons upon him. He also filed affidavits of two witnesses Radhey Shyam and Chhedi Lal, mentioned as witnesses on the summons, before the Trial Court, who stated that in their presence, Process Server never tendered the summons to Ram Pal nor they had signed the duplicate summon. Trial Court and First Appellate Court illegally ignored these affidavits on record. Trial Court held that it is unbelievable that Ram Pal had not taken copy of khatauni for such a long time while First Appellate Court has taken into account the notices issued in the revision filed by Rukmani. In order to decide the application for setting aside decree under Order IX Rule 13 C.P.C. the Court is required to decide as to whether summons of the suit were served or there was any other cause due to which the defendant was prevented to appear before the Court on the date fixed in the suit. Trial Court and First Appellate Court have illegally failed to record any findings in this respect and based their judgment on irrelevant considerations. In such circumstances Board of Revenue has not committed any illegality in setting aside the orders of the Courts below.

In this case, summons were not served upon the defendants. The summons were not sent through post as such presumption of service could not

be raised in this case on the basis of endorsement of 'refusal' by Process Server. In the absence of service of summons, ex parte decree has been rightly set aside by Board of Revenue. **(Shiv Murat and another v. State of U.P. and others 2014 (5) AWC 5295)**

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## **STATUTORY PROVISIONS**

**English Translation of Rajaswa Anubhag-13 Noti. No. 491/1-13-2014-7Ka(51)-2014, dated August 6, 2014, published in the U.P. Gazette, Extra., dated 6<sup>th</sup> August, 2014, p.1**

In exercise of the powers conferred by the proviso to clause (e) of Section 3 of the **Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013** (Act No. 30 of 2013), The Governor is pleased to notify that all District Collectors shall be deemed as appropriate Government for acquisition of the area not in excess of 100 acres for an individual project within their territorial jurisdiction.

**English Translation of Rajaswa Anubhag-13 Noti. No. 493/1-13-2014-7Ka(52)-2014, dated August 6, 2014, published in the U.P. Gazette, Extra., dated 6<sup>th</sup> August, 2014, p.1**

In exercise of the powers conferred by the clause (g) of Section 3 of the **Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013** (Act No. 30 of 2013), The Governor is pleased to designate all the Additional District Collectors (Land Acquisition), special Land Acquisition Officers and Deputy Land Acquisition officers of Uttar Pradesh to perform the functions of the Collector under the said Act within their respective jurisdiction.

**English Translation of Rajaswa Anubhag-13 Noti. No. 414/1-13-2014-7Ka (8)-2014, dated August 6, 2014, published in the U.P. Gazette, Extra., dated 6<sup>th</sup> August, 2014, p.1**

In exercise of the powers under sub-section (1) of Section 43 of the **Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013** (Act No. 30 of 2013), The Governor is pleased to appoint all Assistant Collectors or Deputy Collectors as the case may be of the concern Tehsil of Uttar Pradesh as “Administrator for Rehabilitation and Resettlement” within their respective territorial Jurisdiction.

**Ministry of Social Justice and Empowerment (Deptt. of Social Justice and Empowerment), NOti. NO. G.S.R. 416(E), Dated June 23, 2014, published in Gazette of India, Extra., Part II, Section 3(i), dated 23<sup>rd</sup> June, 2014, pp. 4-6, No. 331**

In exercise of the powers conferred by sub-section (1) of Section 23 of the **Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (33 of 1989)**, the Central Government hereby makes the following rules further to amend the Scheduled Castes and the Scheduled Tribes

(Prevention of Atrocities Ruled, 1995, Namely---

1- (1) These rules may be called the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities (Amendment) Rules, 2014

(2) They Shall come into force on the date of their publication in the Official Gazette.

2- In The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Rules, 1995, for the Scheduled and Annexure-1, the Following Schedule and Annexure-1 shall be substituted, namely—

SCHEDULE

Annexure 1

[See Rule12(4)]

NORMS FOR RELIEF AMOUNT

Sl. No.	Name of Offence	Minimum amount of Relief
1	Drink or eat inedible or obnoxious substance [Section 3(1)(i)]	Ninety thousand rupees or more depending upon the nature and gravity of the offence to each victim and also commensurate with the indignity, insult, injury and defamation suffered by the victim. Payment to be made as follows- 1.25 per cent when the charge sheet is sent to the court 11. 75 per cent when accused are convicted by the lower court.
2	Causing injury insult or annoyance [Section 3(1)(ii)]	
3	Derogatory Act [Section 3(1)(iii)]	
4	Worngful occupation or cultivation of land, etc. [Section 3(1) (iv)]	At least Ninety thousands rupees or more depending upon the nature and gravity of the offence. The land or premises or water supply shall be restored where necessary at Government cost. full payment to be made when charge-sheet is sent to the court
5	Relating to land, premises and water [Section 3(1) (v)]	
6	Begar or forced or bonded labour [Section 3(1) (vi)]	At least ninety thousand rupees to each victim. Payment of 25 per cent at First Information Report stage and 75 per cent on conviction in the lower court.

7	Relating to right to franchise [Section 3(1) (vii)]	Up to seventy-five thousand rupees to each victim depending upon the nature and gravity of the offence.
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8	False, malicious or vexatious legal proceedings [Section 3(1) (viii)]	Ninety thousand rupees or reimbursement of actual legal expenses and damages or whichever is less after conclusion of the trial of the accused.
9	False and frivolous information [Section 3(1) (ix)]	
10	Insult, intimidation and humiliation [Section 3(1) (x)]	Up to ninety thousand rupees to each victim depending upon the nature of the offence. Payment of 25 per cent when charge-sheet is sent to the court and rest on conviction.
11	Outraging the modesty of a woman [Section 3(1) (xi)]	One lakh eighty thousand rupees to each victim of the offence 50 per cent of the amount may be paid after medical examination and remaining 50 per cent at the conclusion of the trail.
12	Sexual exploitation of a woman [Section 3(1) (xii)]	
13	Fouling of water [Section 3(1) (xiii)]	Up to three lakh seventy-five thousand rupees or full cost of restoration of normal facility, including cleaning when the water is fouled, Payment may be made at the state as deemed fit by District Administration.
14	Denial of customary rights of passage [Section 3(1) (xiv)]	Up to three lakh seventy-five thousand rupees or full cost of restoration of right of passage and full compensation of the loss suffered, if any. Payment of 50 per cent when charge sheet is sent to the court and 50 per cent on conviction in lower court.
15	Making of desert place of residence [Section 3(1) (xv)]	Restoration of the site or right to stay and compensation of ninety thousand rupees to each victim and reconstruction of the house at Government cost, if destroyed. To be paid in full when charge sheet is sent to the lower court.

16	Giving false evidence [Section 3(2)and (ii)]	At Least three lakh seventy-five thousand rupees or full—compensation of the loss or harm sustained. 50 per cent ot be paid when charge sheet is sent to Court and 50 per cent on conviction by the lower court.
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17	Committing offences under the Indian Penal Code punishable with imprisonment for a term of ten years or more [Section 3(2)and (v)]	At least one lakh eighty thousand rupees depending upon the nature and gravity of the offence to each victim and or his dependent. The amount shall vary if specifically otherwise provided in the Schedule.
18	Victimization at the hands of a public servant [Section 3(2)and (vii)]	Same as the compensation payable, if the accused was not a public servant.

19	<p>Disability; The definition of disability shall be as given in Section 2 of the persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, and guidelines for their assessment shall be as contained in the Ministry of Social Justice and Empowerment, Government of India Notification No. 154, dated the 1<sup>st</sup> June, 2001, as amended from time to time. A copy of the notification is at Annexure-II to the Schedule.</p> <p>(a) 100 per cent incapacitation</p> <p>(i) None-earning Member of a family</p> <p>(ii) Earning Member of a family</p> <p>(b) Where incapacitation is less than 100 per cent.</p>	<p>At least three lakh seventy-five thousands rupees to each victim of offence. 50 per cent on First Information Report and 25 per cent at charge-sheet and 25 per cent on conviction by the lower court.</p> <p>At least seven lakh fifty thousand rupees to each victim of offence, 50 per cent to be paid on First Information Report or Medical Examination Stage, 25 per cent when charge-sheet sent to court and 25 per cent at conviction in lower court:</p> <p>Provided that an amount of not less than sixty thousand rupees from the amount payable to non-earning member of a family and an amount of not less than one lakh twenty thousand rupees from the amount payable to an earning member of a family may be reduced.</p>
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20	<p>Murder or Death (a) Non-earning Member of a family (b) Earning Member of a family</p>	<p>At least three lakh seventy-five thousand rupees to each case. Payment of 75 per cent after post-mortem and 25 per cent on conviction by the lower court.</p> <p>At least seven lakh fifty-five thousand rupees to each case. Payment of 75 per cent after post-mortem and 25 per cent on conviction by the lower court.</p>
21	<p>Victim of murder, death, massacre, rape mass rape and gang rape, permanent incapacitation and dacoity.</p>	<p>In addition to relief amounts paid under above items, relief may be arranged within three months of date of atrocity as follows-</p> <p>(i) Pension to each widow and/or other dependents of deceased Scheduled Castes and Scheduled Tribes @ Four thousands five hundred rupees per month, or employment to one member of the family of the deceased, or provision of agricultural land, an house if necessary by outright purchase.</p> <p>(ii) full cost of the education and maintenance of the children of the victims. Children may be admitted to Ashram Schools or residential Schools.</p> <p>(iii) Provision of utensils, rice, wheat, dals, pulese, etc. for a period of three month.</p>
22	<p>Complete destruction or burnt houses</p>	<p>Brick or stone masonry house to be constructed or provided at Government cost where it has been burnt or destroyed”</p>

## LEGAL QUIZ

**Q.1.** In a probate proceeding the revocation is sought on ground of no service of notice (Citation). What will be the procedure of revocation under order 9 Rule 13 C.P.C. Only on ground of notice or all aspects of revocation of probate-order will be seen in the proceeding?

**Ans.** Pertaining to the procedure of revocation under Order 9, Rule 13 C.P.C. only on ground of notice or all aspects of revocation of probate-order will be seen in the proceedings. Query is being answered as follows:-

“Madhya Pradesh High Court  
Bablu Mandal vs. Smt. Vandana Bhowmik on 2 November, 2007  
Equivalent citations: 2008(1) MPHT 273  
K.K.Lahoti,J.

Section 268 of the Indian Succession Act provides that the proceedings of the Court of District Judge in relation to the granting of probate and letters of administration shall save as otherwise provided, be regulated, so far as the circumstances of the case in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of Civil Jurisdiction. In view of the aforesaid specific provision under Section 268 of the Act and Section 141 of the CPC, the matter may be examined in the light of provisions contained in Section 263 of the Act. Though the provision of Order 9 of the CPC has not been made specifically applicable, but Section 263 of the Act provides that the grant of probate may be revoked or annulled for just cause and just cause shall be deemed to exist where the proceedings were defective in substance. If the probate was obtained by non-service, or defected service or by a fraudulent service on the other side, it can be very well be treated as a just cause within the meaning of Section 263(a) of the Act. So where the provisions of Section 263 of the Act are wide in nature and meet out all the exigencies including the exigencies enumerated in Order 9 Rule 13 of the CPC it may very well be found that the provision of Order 9 Rule 13, CPC can be invoked in a proceeding for revocation or annulment. A grant of probate on showing that the proceedings were defective in substance can be revoked or annulled. In the opinion of this Court, the provisions of Order 9 Rule 13 of the CPC are not directly applicable, but to show that the service on the defendant was defective or there was a sufficient cause to the defendant for non-appearing before the Court when an ex parte proceedings were directed against the applicant and for this limited purpose, the provisions of Order 9 Rule 13 read with Section 263 of

the Act can be invoked.”

However, for the conditions regarding Grant of Probate, the decisions of Hon’ble High Court of Allahabad given in the case of Smt. Bimla Gaindhar v. Smt. Uma Gaindher and another; AIR 2004 All 329 may also be referred.

**Q.2.** Can co-accused cross examine the witness produced by one accused?

**Ans.** One co-accused can cross examine the witness produced by other co-accused, if the witness so examined gives statement affecting the interest of that co-accused.

Kindly go through commentary on Section 138 Evidence Act of Ratan Lal & Dhiraj Lal.

**Q.3.** In a Sessions cases at the stage of cross examination of P.W.-1, accused’s counsel refused to cross examine the witness on ground that Hon’ble High Court has directed that no coercive process shall be issued to accused at the stage of investigation and that order is not vacated as yet and he is unable to cross examine the witness in absence of the accused. What course is open to the court?

**Ans.** Query is being answered as follows-

Hon’ble Apex Court in case titled Akil @ Javed vs. State of NCT of Delhi, (2013)7 SCC 25 has directed all the Hon’ble High Courts to issue appropriate Circular Letters to ensure compliance of Sec. 309 of Cr.P.C. hoping that respective Hon’ble High Courts would take serious note of the directions issued earlier in Raj Deo Sharma and Shambhu Nath’s cases. Hon’ble Apex Court has also issued direction to all the trial courts to strictly adhere to the procedure prescribed u/s. 309 of the Cr.P.C. The Hon’ble Apex Court in this case also relied on a previous judgment of the Apex Court reported in State of U.P. vs. Shambhu Nath Singh and others, (2001)4 SCC 667 and quoted it’s paragraph 10,11 to 14 and paragraph 33 in this judgment. A Division Bench of our own Hon’ble Allahabad High Court in Criminal Misc. Writ Petition No. 62/2013 vide order dated 24.5.2013 has also stressed for compliance of Sec. 309 Cr.P.C. A Circular Letter No.7756/2013/ Admin G-II/Allahabad/ Dated 30/5/13 is issued by our Hon’ble High Court.

In the query before us it has been mentioned that the direction of

Hon'ble High Court for issuing no coercive process against the accused was specifically for the stage of investigation, although the said direction is not yet vacated but stage of cross examination of PW-1 reveals that the stage of investigation is Already over and charge sheet had already been filed u/s. 173 of Cr.P.C. After taking cognizance on the said charge sheet and committal thereof to the Sessions Court, charge has been framed u/s. 228 of the Cr.P.C., which clearly implies that the accused was present at the time of framing of charge, meaning thereby he might be released on bail and that is why the trial is in progress. The examination-in-chief of PW-1 since already 5recorded and at that stage no objection was taken by the accused's counsel and it is only at the stage of cross examination he has drawn the attention of the court regarding the direction of the Hon'ble High Court probably finding examination-in-chief as well as PW-1 not favourable to accused. Now as stage of investigation is over, therefore the direction of the Hon'ble High Court which was specifically for the stage of investigation is not applicable. In this background the normal courses are open for the court, which are as under:-

- 1) To close the opportunity of cross examination of accused by specifically mentioning that enough opportunity to the accused counsel has been provided, but he has refused to cross examine the witness; or
- 2) To adjourn the cross examination only to the next working day on payment of heavy cost with the condition that accused shall ensure the cross examination of the witness and in case of his failure to do so, his bail may be cancelled; or
- 3) If the gravity of the offences is much higher and in the opinion of the court concerned, it seems that there is a likelihood of tempering and threatening of the witness, the bail of the accused may be cancelled in accordance with law and/or his P.B. be forfeited and notice to sureties be issued; or
- 4) If the accused's counsel agrees opportunity of cross examination may be granted to the lawyer if an application is moved on the ground that the accused would not dispute his identity as the particular accused in the case.

The said courses are in full consonance with the directions of the Apex Court as well as our own Allahabad High Court as mentioned above.

Ref.-

1. Akil @ Javed vs. State of NCT of Delhi, (2013)7 SCC 25  
Paras 34,35,36,37,38,39,40,41,42,43,44

2. State of U.P. vs. Shambhu Nath Singh, AIR 2001 SC 1403  
Paras 9,10,11,12,13,14,16,17,18
3. Circular Letter No. 7756/2013/ Admin G-II/Allahabad/ Dated 30/5/13

**Q.4.** In the matter of collection of toll tax on toll plaza on national highways, is civil court has jurisdiction for the injunction suits?

**Ans.** The power of the government to collect toll flows to the State Government from Entry 59 of List-II, 7<sup>th</sup> Schedule of the Constitution of India. So, as far as the National Highways are concerned, it was decided by the Bombay High Court in the case of Avinash and Ors. v. State of Maharashtra and Ors.; Writ Petition No.4378 of 2003; Maharashtra Law Journal (2004), pg. 511, whenever a road passing through the land which belongs to the State or Central Government, be it a State Highways or National Highways, the local bodies are not barred to impose any tax on vehicles entering in areas of the said local body.

Moreover, by virtue of Entry 13 of Eleventh Schedule read with Article 243G and Entry 4 of Twelfth Schedule read with Article 243W, Constitution of India, local bodies can also impose some levy, duty or tax. Therefore, the position for granting of an injunction on toll is similar to that of imposing an injunction on any levy imposed by any State or its Agencies.

Therefore, granting of an injunction against connection of any tax does not fall within the jurisdiction of Subordinate Courts. Any grievances against collection of taxes may be agitated before the Hon'ble High Court or the Supreme Court under their respective jurisdiction.

**Q.5.** April,2014- Where a succession Certificate was issued by the Court in favour of the applicant but before the certificate was acted upon the applicant died and his legal heir applied for fresh succession certificate with respect to the same property. Whether fresh court fee would be payable on the total value of debt or security mentioned in the application?

**Ans.** An application for the certificate must be accompanied by a deposit of court fee and on the death of the holder of the certificate, if a fresh application is made, the court fee has to be paid over again. (**Re Saroja Bashini, 20 CWN 1125**) However, payment of court fee is not a condition precedent to be maintainability of the petition and it could be paid at the time of issuance of the certificate also. (**Usha & Ors. vs. State of Orissa, AIR 1998 Ori. 146**).

Therefore, in the present case fresh court fee will be paid for issuing succession certificate on application of the heir of deceased applicant. The

court fee paid by previous applicant will not be adjusted against the court fee liable to paid in subsequent application. It is not mandatory that the court fee on certificate should be paid along with the application.

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